No. 93-644-CSX
Status: GRANTED

Title: Honda Motor Co., Ltd., et al, Petitioners
v.
Karl L. Oberg

Docketed:
October 25, 1993

Court: Supreme Court of Oregon

Counsel for petitioner: Frey,Andrew L

Counsel for respondent: Gaylord,William, Thomas,Raymond F., Engels,David A., Patrick,Clayton C., Tribe,Lawrence H.

Entry	Date	Note	Proceedings and Orders
1	Sep 1 1993	G	Application (A93-209) for a stay of judgment of supreme court of Oregon pending the filing of a petition for a writ of certiorari, submitted to Justice O'Connor.
2	Sep 3 1993		Application (A93-209) granted by Justice O'Connor receipt of a response and further order of the undersigned or of the Court..
3	Sep 10 1993		Response to application (A93-209) filed by Karl L. Oberg.
4	Sep 13 1993		(A93-209) Reply to oppositiion to application for a stay
5	Sep 16 1993		(A93-209) Application granted by Justice O'Connor pending the timely filing and disposition of a petition for a writ of certiorari
6	Oct 25 1993	G	Petition for writ of certiorari filed.
8	Nov 19 1993		Order extending time to file response to petition until December 20, 1993.
10	Dec 6 1993		Order extending time to file response to petition until December 20, 1993.
11	Dec 20 1993		Brief of respondent Karl Oberg in opposition filed.
13	Dec 28 1993	X	Reply brief of petitioners filed.
12	Dec 29 1993		DISTRIBUTED. January 14, 1994 (Page 2)
14	Jan 14 1994		Petition GRANTED.
			**********
15	Feb 14 1994	*	Record filed. Original proceedings Supreme Court of Oregon (4 BOXES) CONTAINS SEALED RECORDS.
16	Feb 18 1994	G	Motion of petitioners to dispense with printing the joint appendix filed.
18	Feb 24 1994		Brief amici curiae of Snap-On Tools Corporation, et al. filed.
17	Feb 28 1994		Motion of petitioners to dispense with printing the joint appendix GRANTED.
19	Feb 28 1994		Brief of petitioners Honda Motor Co., Ltd.,et al. filed.
20	Feb 28 1994		Brief amicus curiae of Equal Employment Advisory Council filed.
21	Feb 28 1994		Brief amici curiae of Product Liability Advisory Council, Inc., et al. filed.
22	Feb 28 1994		Brief amici curiae of American Council of Life Insurance, et al. filed.
23	Feb 28 1994		Brief amici curiae of CBS Inc.,et al. filed.
24	Feb 28 1994		Brief amicus curiae of Washington Legal Foundation filed.
25	Mar 4 1994		CIRCULATED.

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Entry	Date	Note	Proceedings and Orders
26	Mar 7 1994		SET FOR ARGUMENT WEDNESDAY, APRIL 20, 1994. (1ST CASE).
27	Apr 1 1994	X	Brief amicus curiae of Oregon Trial Lawyers Association filed.
28	Apr 1 1994	X	Brief amici curiae of Legal Historians Daniel R. Coquillette, et al. filed.
29	Apr 1 1994	X	Brief amicus curiae of Association of Trial Lawyers of America filed.
30	Apr 1 1994	X	Brief amicus curiae of Trial Lawyers for Public Justice filed.
31	Apr 1 1994	X	Brief of respondent Karl Oberg filed.
33	Apr 1 1994	X	Brief amici curiae of Hawaii, et al. filed.
34	Apr 20 1994		ARGUED.
35	Apr 22 1994	G	Motion of respondent for leave to file a supplemental brief after argument filed.
36	Apr 26 1994		Opposition of Honda Motor Co., et al. to motion of respondent Karl Oberg for leave to file a supplemental brief after argument filed.
37	May 2 1994		Motion of respondent for leave to file a supplemental brief after argument GRANTED.

93-644

No. 93-

FILED
OCT 25 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD.; AND AMERICAN HONDA MOTOR CO., INC., PETITIONERS

v.

KARL L. OBERG, RESPONDENT

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Oregon's denial of any judicial review of compensatory and punitive damages verdicts for excessiveness violates the Due Process Clause of the Fourteenth Amendment.

RULE 29.1 STATEMENT

Petitioners Honda R&D Co., Ltd. and American Honda Motor Co., Inc. are subsidiaries of petitioner Honda Motor Co., Ltd., a Japanese corporation. A complete listing of Honda Motor Co., Ltd.'s subsidiaries is set forth at App., *infra*, 94a-97a.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No.

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD.; AND AMERICAN HONDA MOTOR CO., INC., PETITIONERS

v.

KARL L. OBERG, RESPONDENT

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Honda Motor Co., Ltd., Honda R&D Co., Ltd., and American Honda Motor Co., Inc. (hereinafter "Honda") respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Oregon in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Oregon (App., *infra*, 1a-71a) is reported at 316 Or. 263 and 851 P.2d 1084. The opinion of the Court of Appeals of Oregon (App., *infra*, 72a-88a) is reported at 108 Or. App. 43 and 814 P.2d 517. The order of the Circuit Court for Multnomah County denying petitioners' post-trial motions (App., *infra*, 89a-90a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Oregon was entered on May 20, 1993 (App., *infra*, 1a), and a timely filed petition for reconsideration was denied on July 27, 1993 (App., *infra*, 92a-93a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

STATEMENT

The Supreme Court of Oregon has interpreted Article VII, Section 3 of the Oregon Constitution to prohibit judicial review, at both trial and appellate levels, of the amount of either compensatory or punitive damages awarded by jury verdicts. The straightforward question presented here is whether Article VII, Section 3, as so construed, deprives civil damages defendants of property without due process, in violation of the Fourteenth Amendmen

1. *Trial Court Proceedings*. Respondent Karl Oberg was injured after a three-wheeled all-terrain vehicle manufactured and sold by Honda overturned while he was attempting to climb a steep embankment. He subsequently brought suit against Honda. The case was tried to a jury, which, by a vote of 11-1, awarded Oberg $919,390.39 in compensatory damages (only $19,390.39 of which was for Oberg's medical expenses) and $5 million in punitive damages. Because the jury found Oberg 20% at fault, the trial court reduced the compensatory award to $735,512.31 pursuant to Oregon's comparative negligence statute.

Honda then filed motions for a new trial and for judgment notwithstanding the verdict contending, among other

things, that both the compensatory and the punitive verdicts were excessive. Honda argued that the $900,000 award for non-economic injuries was insupportably high because it was more than 46 times the size of Oberg's special damages and because the interest alone on that award would yield more than four times the amount of general damages suggested by Oberg's counsel during closing argument.[1] In support of its contention that the compensatory award was excessive, Honda cited cases from other jurisdictions drastically cutting compensatory awards under similar circumstances.[2]

Honda also attacked the $5 million punitive judgment as grossly excessive. It pointed out that (1) it was held liable for strict liability design defect and negligent failure to warn,

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[1] Oberg's counsel suggested that an award of $50 per day – $18,300 per year – for the rest of Oberg's life would be an appropriate measure of his pain and suffering. If the $900,000 were invested at the statutory rate of 9 percent, it would yield $81,000 per year – more than four times the amount Oberg's counsel suggested as reasonable – without invading the principal. Even if invested at the current 30-year treasury bond rate of approximately 6 percent, Oberg's judgment would yield $54,000 per year – roughly three times the amount his counsel suggested as reasonable.

[2] *E.g.*, *Thornton* v. *Montefiore Hospital*, 469 N.Y.S.2d 979 (S. Ct.) (ordering remittitur of award for pain and suffering from $1 million to $500,000; award for future medical expenses from $1 million to $34,480; and award for future lost earnings from $500,00 to $350,000), modified, 473 N.Y.S.2d 758 (App. Div. 1983) (ordering further remittitur of pain and suffering award to $400,000 and lost earnings award to $50,000); *Illey* v. *Hatley*, 693 S.W.2d 506 (Tex. Ct. App. 1985) (suggesting remittitur of $1 million award to $174,000), writ ref'd n.r.e. (Dec. 11, 1985). For a more recent example, see *Sears, Roebuck & Co.* v. *Harris*, No. 1911519, 1993 WL 341147, at *15-*16 (Ala. Sept. 10, 1993) (ordering $5.5 million award reduced to $850,001).

not some more aggravated type of misconduct; (2) it was subject to numerous other lawsuits seeking large compensatory and punitive judgments for precisely the same design and warnings; (3) the punitive damages were more than 258 times Oberg's economic damages; (4) the $5 million penalty surpassed every other punitive award reflected in reported decisions of the Oregon courts; and (5) the punitive award was 50 times the size of the maximum fine for criminal assault (the most closely analogous crime under Oregon law).

The trial court denied Honda's motions without comment. App., infra, 89a-90a.

2. *The Decisions On Appeal.* The Oregon Court of Appeals affirmed the judgment. Although it reviewed all of Honda's other objections, the court declined to entertain its challenge to the size of the punitive verdict, concluding that the Oregon Constitution, as construed by the Oregon Supreme Court in *Van Lom* v. *Schneiderman*, 210 P.2d 461 (1949), prohibits both trial and appellate courts from setting aside a damages award on the ground that it is excessive. App., *infra*, 86a-87a. In so ruling, the court addressed and rejected Honda's contention that the Due Process Clause of the Fourteenth Amendment requires judicial review of the size of punitive exactions challenged as excessive. *Id.* at 81a-87a. The court did not expressly address Honda's companion challenge to the size of the compensatory verdict, presumably concluding that its holding regarding punitive damages disposed of the issue as to compensatory damages as well.

The Oregon Supreme Court affirmed. It stated: "We do not interpret [*Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991)] to hold that an award of punitive damages, to comport with the requirements of the Due Process Clause, always must be subject to a form of post-verdict or appellate review that includes the possibility of remittitur." App., *infra*, 25a. According to the state supreme court, the requirements of due process are satisfied in Oregon because

juries are instructed on the factors to be considered in determining an appropriate exaction and because the courts may review both the correctness of those instructions and the sufficiency of the evidence to support a finding of punitive liability. *Id.* at 26a-27a. Like the intermediate appellate court, the state supreme court did not separately address Honda's challenge to the size of the compensatory award.

Justice Peterson dissented. He concluded that due process requires both "'meaningful and adequate review [of the size of punitive exactions] by the trial court'" and appellate review to "'make[] certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.'" App., *infra*, 60a (quoting *Haslip*, 499 U.S. at 20, 21).

Honda filed a timely petition for reconsideration, informing the court of the possible relevance of *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), which was then pending before this Court, and requesting the opportunity to provide supplemental briefing after *TXO* was decided. After the decision in *TXO*, however, the Oregon Supreme Court denied the petition for reconsideration without calling for additional briefing. App., *infra*, 92a-93a.

Honda then filed a motion to stay the appellate judgment in the Oregon Supreme Court, arguing that this Court likely would grant review because the decision of the Oregon Supreme Court was flatly inconsistent with *TXO* and *Haslip*. The Oregon Supreme Court nonetheless declined to stay the appellate judgment, and Honda accordingly filed a motion for a stay in this Court. Oberg opposed Honda's motion in its entirety and alternatively contended that, at a minimum, any stay should be limited to the punitive judgment. On September 16, 1993, Justice O'Connor, sitting as Circuit Justice for

the Ninth Circuit, granted a stay with respect to the entire judgment. App., *infra*, 91a.

REASONS FOR GRANTING THE PETITION

Whatever the virtues of the jury system, it has long been recognized that juries are capable, on occasion, of making serious errors in their determinations. The risk of error is particularly high when it comes to computing damages, which will often involve complex calculations based on concepts that are difficult even for the best educated among us to understand. That risk in turn is at its zenith when it comes to the determination of an appropriate amount of punitive damages. In such cases, juries with no prior experience in the administration of judicial punishment, possibly impassioned by the perceived injustice of the conduct of a large, impersonal, out-of-state (here, foreign-owned) corporation and bedazzled by evidence of the size and financial condition of the corporate defendant, must determine what is needed to provide just retribution or reasonable deterrence.

Precisely because the determination of compensatory and punitive damages is fraught with the risk of injustice, the practice of providing judicial excessiveness review is deeply rooted in English and American law. Every State other than Oregon has long given trial judges the authority to grant new trials, or to condition the denial of a new trial on a plaintiff's acceptance of a remittitur, when the judge concludes that excessive damages have been awarded; and, as best we can tell, all of them provide in addition for some degree of appellate review of the trial court's excessiveness determination.[3]

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[3] As of 1961, 47 of the 50 States afforded appellate review of a trial court's denial of a new trial or remittitur on grounds of the excessiveness of the verdict. *Dagnello* v. *Long Island R.R.*, 289 F.2d 797, 798-799 & n.1 (2d Cir. 1961) (citing cases from every state other than Alaska, Maryland, and Oregon). Since that time, appellate courts in Alaska and Maryland have recognized and exer-

This fundamental feature of Anglo-American jurisprudence is indispensable to fair proceedings. Oregon's categorical renunciation of this otherwise universal safeguard cannot pass muster under this Court's general due process standards. Moreover, the Oregon Supreme Court's conclusion that due process does not require *any* judicial review of the size of punitive verdicts (or, by the same token, compensatory verdicts) cannot be reconciled with this Court's recent decisions in *TXO* and *Haslip*. Review is warranted to correct the insupportable holding of the Oregon Supreme Court and to assure litigants in Oregon courts of the protection against arbitrary jury verdicts long enjoyed by litigants in every other State.

A. Oregon's Total Denial Of Judicial Excessiveness Review Of Jury Verdicts Departs Dramatically From Deeply Ingrained Traditions Of Anglo-American Law And Deprives Litigants Of Procedures Essential To Ensure Fundamental Fairness, In Violation Of Due Process Requirements.

1. The practice of providing judicial review of the size of damages verdicts (whether compensatory or punitive) is fundamental and deeply ingrained in Anglo-American law, dating back at least as far as 1655. See *Wood and Gunston*, 82 Eng. Rep. 867 (K.B.) (granting a new trial because the jury's damages award was excessive). See generally 3 W. Blackstone, *Commentaries on the Laws of England* 388-389 (1768); D. Graham, *A Treatise on the Law of New Trials in Cases Civil and Criminal* 1127-1130 (2d ed. 1855). By 1786,

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cised their authority to order new trials or remittitur because of an excessive damages award left standing by a trial court. See, *e.g.*, *City of Nome* v. *Ailak*, 570 P.2d 162, 173-174 (Alaska 1977); *Alexander & Alexander, Inc.* v. *B. Dixon Evander & Assocs.*, 596 A.2d 687, 709-711 (Md. Ct. Spec. App. 1991), cert. denied, 605 A.2d 137 (Md. 1992). To our knowledge, no State that afforded appellate review in 1961 has withdrawn it subsequently.

the propriety of reviewing the size of jury verdicts was so well established that Lord Mansfield was led to comment that "there was no doubt but that the Court had the power of taking the opinion of a second jury in any case where the damages were excessive." *Ducker* v. *Wood*, 99 Eng. Rep. 1092 (K.B.). See also, *e.g.*, *Hewlett* v. *Cruchley*, 128 Eng. Rep. 696, 698 (C.P. 1813) ("it is now well acknowledged in all the courts of Westminster-hall, that whether in actions for criminal conversation, malicious prosecutions, words, or any other matter, if the damages are clearly too large, the Courts will send the inquiry to another jury").

Since the earliest days of this Nation, American courts also have recognized and exercised the authority to review the size of jury verdicts. For example, in the seminal case involving the power of federal courts to use remittitur, Justice Story, sitting as Circuit Justice, explained:

> As to the question of excessive damages, I agree, that the court may grant a new trial for excessive damages. * * * It is indeed an exercise of discretion full of delicacy and difficulty. But if it should clearly appear that the jury have committed a gross error, or have acted from improper motives, or have given damages excessive in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case.

Blunt v. *Little*, 3 F. Cas. 760, 761-762 (D. Mass. 1822) (ordering new trial unless plaintiff agreed to remittitur). Accord *Sampson* v. *Smith*, 15 Mass. 365, 367 (1819) ("[w]e entertain no doubt of the authority of the court to set aside a verdict on account of the largeness of the damages"). See also, *e.g.*, *Guerry* v. *Kerton*, 2 Rich. 507 (S.C. Ct. App. 1846) (ordering new trial unless plaintiff agreed to remittitur); *Diblin* v. *Murphy*, 3 Sand. 19 (N.Y. Super. Ct. 1849) (same).

So well entrenched is the concept of judicial review of damages verdicts that, as far as we are aware, Oregon stands alone among the States in denying such review entirely. Indeed, the Oregon Supreme Court seems to have recognized as much. *Van Lom*, 210 P.2d at 471 ("Oregon today occupies in this respect a lonely eminence"). See also *Rogers* v. *Hill*, 576 P.2d 328, 335 (Or. 1978) (Tongue, J., concurring) ("[n]o other state has adopted such a constitutional limitation upon the common law powers of the courts"); Lusk, *Forty-Five Years of Article VII, Section 3, Constitution of Oregon*, 35 OR. L. REV. 1, 28 (1955) ("[s]o far as can be ascertained by an intensive search, no other state has ever gone to such lengths").

2. This Court has made clear that when a State chooses to deviate from traditionally accepted procedures, those who would defend the State's aberrant procedure have a high burden:

> [C]onsistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to the process of law and protect the citizen in his private right, and guard him against the arbitrary action of government.

Twining v. *New Jersey*, 211 U.S. 78, 101 (1908).

Three factors are particularly relevant in determining whether Oregon's departure from "ancient procedure" comports with due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. *Eldridge*, 424 U.S. 319, 335 (1976).[4] Consideration of these three elements demonstrates that Oregon's refusal to provide any judicial review of the size of a jury verdict violates due process.

First, the private property interest at stake is "enormous." *Haslip*, 499 U.S. at 54 (O'Connor, J., dissenting).[5] Money, in whatever amount, is a core property interest. See, *e.g.*, *Board of Regents* v. *Roth*, 408 U.S. 564, 571-572 (1972) (stating that the concept of "property" is not limited to "real estate, chattels, or money"). Moreover, in today's litigation climate the *amount* of money involved can be staggering: seven-, eight-, and even nine-figure judgments are now common (and, everywhere other than Oregon, are commonly reduced).[6] Defendants – no matter how large –

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[4] Some Justices would uphold all traditionally accepted procedures against due process attack without subjecting them to scrutiny under the *Mathews* test. See, *e.g.*, *Haslip*, 499 U.S. at 28-38 (Scalia, J., concurring). However, all Justices appear to be in agreement that reliance on *Mathews* is appropriate when, as here, the procedures at issue deviate from traditionally accepted ones. See *Burnham* v. *Superior Court*, 495 U.S. 604, 622, 626 (1990) (opinion of Scalia, J.).

[5] There can be no doubt that a damages verdict, compensatory or punitive, constitutes a deprivation of property. In fact, the proposition is so self-evident that this Court routinely analyzes due process challenges to civil trial procedures without even pausing over the threshold question whether a property interest protected by the Due Process Clause exists. See, *e.g.*, *TXO*, *supra*; *Haslip*, *supra*; *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985).

[6] See, *e.g.*, *Grimshaw* v. *Ford Motor Co.*, 174 Cal. Rptr. 348, 389-391 (Cal. Ct. App. 1981) (affirming order granting new trial

have an obvious, strong, and legitimate interest in not being made to pay such judgments in the absence of adequate procedural safeguards.

Second, the risk that, in the absence of some form of judicial review, defendants will suffer an erroneous deprivation of their property is real and substantial. The Oregon Supreme Court has itself recognized that its interpretation of Article VII, Section 3 causes injustice in particular cases. Thus, in one case it stated: "If this court were authorized to exercise its common law powers, we would *unhesitatingly* hold that the award of $35,000 as punitive damages was excessive." *Fowler* v. *Courtemanche*, 274 P.2d 258, 275 (1954) (emphasis added). See also *Van Lom*, 210 P.2d at 471

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unless plaintiff accepted remittitur of punitive judgment from $125 million to $3.5 million); *Award Is Slashed*, Nat'l L.J., Aug. 31, 1992, at 6 (reporting that Illinois trial court had ordered $124.5 million punitive award against The Upjohn Company remitted to $35 million); *Alexander & Alexander, Inc.* v. *B. Dixon Evander & Assocs.*, 596 A.2d 687, 710-711 (Md. Ct. Spec. App. 1991) (jury imposed $40 million punitive exaction; trial court ordered remittitur to $12.5 million; appellate court ordered new trial on ground that $12.5 million was grossly excessive), cert. denied, 605 A.2d 137 (Md. 1992); *Republic Ins. Co.* v. *Hires*, 810 P.2d 790, 793 (Nev. 1991) (reducing punitive award from $22.5 million to $5 million); *State Farm Mut. Auto. Ins. Co.* v. *Zubiate*, 808 S.W.2d 590, 605-606 (Tex. Ct. App. 1991) (ordering new trial unless plaintiff accepted remittitur of punitive award from $15 million to $600,000), writ denied (Sept. 18, 1991); *Machine Maintenance & Equip. Co.* v. *Cooper Indus., Inc.*, 661 F. Supp. 1112, 1117-1118 (E.D. Mo. 1987) (ordering new trial unless plaintiff accepted remittitur of punitive award from $10 million to $100,000); *Sears, Roebuck & Co.* v. *Harris*, No. 1911519, 1993 WL 341147, at *15-*16 (Ala. Sept. 10, 1993) (ordering $5.5 million compensatory judgment reduced to $850,001). See generally *Huge Jury Awards Often Don't Survive Appeals and Motions*, Nat'l L.J., Jan. 25, 1993, at S20.

(acknowledging the effect of Article VII, Section 3 to "remov[e] from the judges [the] power to correct a miscarriage of justice by ordering a new trial"). More generally, a study typically cited by *proponents* of the existing system for administering punitive damages stresses that courts routinely use remittitur when they believe a punitive verdict to be excessive. See Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 54-59 (1992).[7] By definition, every case in which a court has used remittitur is one in which the defendant would have suffered an erroneous deprivation of property in the absence of judicial review of the verdict.

Moreover, notwithstanding the Oregon Supreme Court's assertion to the contrary (App., *infra*, 26a), the mere fact that juries may receive guidance in the form of instructions hardly is adequate to protect defendants from verdicts that are excessive because of passion, bias, prejudice, arbitrariness, "inexperience in business, incapacity, misapprehension, inattention to circumstances, and a thousand other innocent causes" (3 W. Blackstone, *supra*, at 389).[8] Courts long have

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[7] Indeed, the availability of meaningful judicial review of the size of punitive awards was repeatedly invoked in *TXO* as one of the principal reasons why other checks on the administration of punitive damages are unnecessary. See, *e.g.*, Brief of Amicus Curiae Association of Trial Lawyers of America in Support of Respondents at 15-16; Brief of *Amicus Curiae* National Association of Securities and Commercial Law Attorneys in Support of Respondents at 25-30; Brief of Trial Lawyers for Public Justice As Amicus Curiae in Support of Respondents at 4; Brief of the Alabama Trial Lawyers Association as Amicus Curiae in Support of Respondents at 8.

[8] Nor, of course, can an unjustly high damages award be rectified by review of the wholly distinct question of the sufficiency of the evidence supporting the imposition of *liability*, as the court

recognized that some form of judicial supervision of jury verdicts is essential. Thus, the New York Supreme Court, Appellate Division, explained more than 140 years ago:

> The right of the court * * * to interfere, when the damages found by the jury are clearly excessive, though it has always been cautiously exercised, has never been denied. *Such a right is absolutely necessary to the safe administration of justice*, and ought, in all proper cases, to be asserted and exercised.
>
> [A] jury must not be allowed to exercise despotic power. As they partake of the common infirmities of humanity, they are liable, occasionally, to exceed the bounds of sober judgment, though such instances, at the present day at least, are extremely rare. When they do occur, it is the unquestionable duty of the court to interfere, not by substituting its own judgment for that of a jury, but by ordering the case to be submitted to another jury.

Collins v. *Albany & Schenectady R.R.*, 12 Barb. 492, 495 (1852) (emphasis added). Or, as the Supreme Judicial Court of Massachusetts had even earlier opined:

> [W]henever the court is satisfied, that there is no reasonable measure between the injury and the compensation, it is their duty to submit the cause to another jury. * * * *[I]f there be not a correcting power in the court, great injustice may be done under the influence of the purest motives.*

Sampson v. *Smith*, 15 Mass. 365, 367 (1819) (emphasis added). Accord *Blunt* v. *Little*, 3 F. Cas. at 761-762; *Thompson* v. *Morris Canal & Banking Co.*, 2 Harr. 480, 486-487 (N.J. Sup. Ct. 1840); *Flannery* v. *Baltimore & Ohio*

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below maintained in a classic *non sequitur* (App., *infra*, 27a).

R.R., 15 D.C. (4 Mackey) 111, 125 (1885). See generally 3 W. Blackstone, *supra*, at 389-391 (the authority of trial judges to grant new trials is an essential component of trial by jury).

Juries today are no less immune from error than they were in the days of Blackstone and Story. They may misunderstand the court's instructions on the law governing the award of damages or the imposition of punishment, disregard those instructions because of passion or prejudice, succumb to redistributionist impulses, or return a manifestly excessive verdict for a range of other reasons. Moreover, even the most painstaking, impartial, and well-intentioned jury labors under a handicap that derives from the nature of the institution: jurors lack experience with or a frame of reference for setting intangible damages or inflicting judicial punishment. Whereas a judge can compare the imposition of a criminal sentence or the award of damages for a particular type of disability with judgments arrived at in a range of other cases, the jury possesses no such information against which to check its verdict. The risk of aberrational results is simply too high in the absence of some (appropriately deferential but nevertheless meaningful) judicial excessiveness review.[9]

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[9] In opposing a stay, Oberg relied on this Court's statements that *appellate* review is not an essential element of due process. But this case is not about a system that provides trial court review but denies appellate review. Rather, it is about a system that denies review by *any* court. The question whether appellate review is constitutionally required may never arise in this case, since, if this Court determines that the *Van Lom* rule is unconstitutional, there is no reason to suppose that Oregon would not per-mit the same appellate review of a trial court's new trial/remittitur ruling as it does of any other analogous ruling. The time to address the right to appellate review is when (if ever) there is a trial court ruling from which such review is denied.

Third, whatever fiscal or administrative burdens might be associated with providing excessiveness review cannot outweigh the manifest injustice that inheres in Oregon's denial of such review. For one thing, the fact that *no* other State has sought to deny excessiveness review constitutes a powerful indication that the administrative costs of providing such review are not particularly heavy. Moreover, it bears noting that Oregon courts routinely provide excessiveness review in cases arising under federal statutes, such as the Jones Act and the Federal Employers Liability Act. See, *e.g.*, *Staples* v. *Union Pacific R.R.*, 508 P.2d 426, 427 (Or. 1973). Finally, even in cases brought under Oregon law, the added cost of providing excessiveness review would be insignificant given that Oregon courts already review a plethora of legal issues, including the sufficiency of the evidence supporting liability and the correctness of the jury instructions on damages.

In short, Oregon's denial of any judicial review of the size of damages awards (whether compensatory or punitive) deprives civil damages defendants of an indispensable and deeply rooted element of fair procedure and therefore cannot pass muster under this Court's established due process jurisprudence.

B. The Decision Below Cannot Be Squared With *TXO* And *Haslip*.

The Oregon Supreme Court's decision does not merely run afoul of this Court's general due process jurisprudence. It also conflicts squarely with this Court's specific pronouncements in *Haslip* and *TXO* regarding the procedural due process requirements for the imposition of punitive damages.

In *Haslip*, this Court held that the common law method of imposing punitive damages generally, and Alabama's system in particular, satisfy at least the minimum requirements of due process. The Court expressly recognized that judicial review of the size of punitive judgments is an essential component of the common law method:

> Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.

499 U.S. at 15. In rejecting the procedural due process challenge to Alabama's system, the Court again emphasized the significance of judicial review, observing that Alabama trial courts are required to conduct a post-verdict hearing for purposes of assessing the reasonableness of punitive damages verdicts and that the Alabama Supreme Court subsequently conducts its own review of such exactions, applying a multifactor test. *Id.* at 20-22. See also *id.* at 40 (Kennedy, J., concurring) ("[e]lements of whim and caprice do not predominate when the jury reaches a consensus based upon arguments of counsel, the presentation of evidence, and instructions from the trial judge, *subject to review by the trial and appellate courts*") (emphasis added). Indeed, the Court took pains to contrast the "detailed" review conducted by Alabama courts with the considerably more limited "passion and prejudice" review available in some state systems, which had caused Justices concern in earlier cases. *Id.* at 21 & n.10.[10]

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[10] The Court's discussion of judicial review under Alabama state-law standards strongly implies its assumption that procedural due process requires review of *both* federal substantive due process and state-law excessiveness challenges to the size of an award. Surely, however, due process (not to mention Supremacy Clause principles) requires, at a minimum, that state courts entertain and pass on the federal-law contention that a particular punitive verdict is so grossly excessive as to violate substantive due process. Oregon's refusal to provide even that limited form of review is particularly indefensible.

In the wake of *Haslip*, several state courts have explicitly recognized that meaningful judicial review of the size of a punitive damages verdict is an essential element of due process. See, *e.g.*, *Adams* v. *Murakami*, 813 P.2d 1348, 1356 (Cal. 1991); *Hodges* v. *S.C. Toof & Co.*, 833 S.W.2d 896, 902 (Tenn. 1992); *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897, 907-910 (W. Va. 1991); *Alexander & Alexander, Inc.* v. *B. Dixon Evander & Assocs.*, 596 A.2d 687, 709-710 (Md. Ct. Spec. App. 1991), cert. denied, 605 A.2d 137 (Md. 1992). See also *Mattison* v. *Dallas Carrier Corp.*, 947 F.2d 95, 105-106 (4th Cir. 1991).[11]

That these courts correctly construed the applicable procedural due process requirements was made crystal clear in *TXO*. Although the Court upheld the procedures used by the West Virginia courts in that case, each of the Justices wrote or joined an opinion indicating either expressly or implicitly that judicial review is constitutionally required when a defendant challenges a punitive verdict as excessive.

A plurality of four Justices (Stevens, J., joined by Rehnquist, C.J. and Blackmun and Kennedy, JJ.) found the trial judge's post-verdict review in *TXO* to have been adequate, but only after noting that he had provided a hearing on the post-verdict motions and orally indicated his conclusion that the conduct at issue was egregious enough to support the amount of punitive damages imposed. 113 S. Ct. at 2724, 2717 n.12. The plurality also found the state supreme court's review of the punitive judgment to meet constitutional standards, observing that the court's opinion "gave careful attention to the relevant precedents." *Ibid*. This discussion of the *quality* of post-verdict review afforded TXO plainly

[11] To our knowledge no court, other than the court below, has adopted a contrary interpretation of *Haslip*.

presupposes a requirement that there be some kind of post-verdict judicial excessiveness review.[12]

The concurring opinion of Justice Scalia (joined by Justice Thomas) makes explicit what is implicit in the plurality opinion: "procedural due process requires judicial review of punitive damages awards for reasonableness." 113 S. Ct. at 2727 (internal quotation marks deleted). By the same token, Justice Scalia expressly recognized that, because a judgment for compensatory damages, like one for punitive damages, deprives a defendant of property, due process also requires "judicial review of the reasonableness of jury-awarded compensatory damages (including damages for pain and suffering)." *Ibid*.

The dissent (Justice O'Connor, joined in full by Justice White and in relevant part by Justice Souter) concluded that the post-trial review afforded by the trial court and by the state supreme court was constitutionally deficient. 113 S. Ct. at 2740-2742. *A fortiori*, the dissent was of the view that total denial of any post-verdict excessiveness review runs afoul of due process.

Haslip and *TXO* thus confirm what traditional due process considerations indicate: Due process requires meaningful judicial review of the size of punitive (and, at least implicitly, compensatory) awards.

[12] We note in this regard that the dissenting Justices construed the plurality opinion to accept the proposition that judicial review is required, although they took issue with the plurality's holding that the review provide by the West Virginia courts was adequate. See 113 S. Ct. at 2742 (O'Connor, J., dissenting) (under the plurality's decision, "courts now may disregard the post-trial review required by due process at whim or will, so long as they do not deny its necessity openly or altogether").

C. The Issue Is Of Substantial Practical Importance.

Although Oregon is the only State that entirely denies judicial review of the size of jury verdicts, this procedural defect in its system is nonetheless extraordinarily significant. To begin with, Oregon is far from immune from eye-opening jury verdicts. In addition to the approximately $6 million total verdict in this case, Oregon appellate courts recently have affirmed verdicts of approximately $9 million and $7 million. See *Eulrich* v. *Snap-On Tools Corp.*, 853 P.2d 1350 (Or. Ct. App. 1993), review denied, No. S40453 (Or. Sept. 21, 1993); *Lovejoy Specialty Hospital, Inc.* v. *Advocates for Life, Inc.*, 855 P.2d 159 (Or. Ct. App. 1993).[13] And, needless to say, there is absolutely no guarantee that the kind of breathtaking verdicts from juries in other states that we have cited above (at pages 10-11, note 6) could not someday occur in Oregon.

The *Lovejoy* case is a good example of the problems potentially inhering in Oregon's system of unbridled jury discretion in setting damages, including punitive damages. There, 21 abortion protesters were each ordered to pay $200,000 in punitive damages, and three other protesters were each ordered to pay $500,000 in punitive damages. See 855 P.2d at 161. On the surface, these very substantial verdicts raise concerns whether the jury was acting out of bias or prejudice against people whose views they might have disliked and whether the jury gave due consideration to the impact of the penalties on the defendants' financial condition. Perhaps the amounts of the verdicts were fully justified under Oregon law and consistent with the federal Constitution, but it is surely disturbing that the defendants were deprived of any opportunity to have them reviewed by a judge.

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[13] We are advised that the defendants in *Eulrich* intend to file a petition for certiorari presenting the same issue as is raised here.

Although every State other than Oregon appears to permit at least *some* judicial excessiveness review, the review afforded by many is so limited that it too potentially raises due process issues. See *Haslip*, 499 U.S. at 21 n.10. See also *American Nat'l Bank & Trust Co.* v. *Hanson*, 113 S. Ct. 3029 (1993) (remanding case to the Supreme Court of Kentucky to reconsider, in light of *TXO*, whether the scope of judicial review of punitive damages awards in Kentucky comports with due process). A decision regarding the propriety of Oregon's total denial of judicial excessiveness review is almost certain to bear on the legitimacy of the many state systems that afford only minimal judicial scrutiny of damages awards. Accordingly, the issue in this case has importance well beyond Oregon.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1993

APPENDICES

APPENDIX A

KARL L. OBERG, RESPONDENT ON REVIEW, v. HONDA MOTOR CO., LTD.; HONDA R & D CO., LTD.; AND AMERICAN HONDA MOTOR CO., INC., PETITIONERS ON REVIEW.

SC No. S38436

SUPREME COURT OF OREGON

316 ORE. 263; 851 P.2D 1084

JANUARY 10, 1992, ARGUED AND SUBMITTED;
MARCH 30, 1993,
REASSIGNED
MAY 20, 1993, DECIDED
MAY 20, 1993, FILED

GRABER, Judge.

This case involves a product liability claim against defendants, who manufactured and sold a 1985 Honda Model ATC350X three-wheeled all-terrain vehicle (ATV) used by plaintiff. Plaintiff attempted to drive the ATV up a steep embankment; it overturned backward, injuring him. Plaintiff then brought this action against defendants, alleging that they were negligent in manufacturing, distributing, and selling the ATV, because they knew or should have known that it had an inherently dangerous design that rendered it unreasonably dangerous to users, and alleging strict liability.

A jury returned a verdict in favor of plaintiff, awarding both general and punitive damages.[1] Defendants appealed.

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[1] The jury awarded plaintiff $919,390.39 in compensatory damages and $5,000,000 in punitive damages. It allocated 20 percent of the fault to plaintiff and 80 percent to defendants. The

They argued, among other things, that the trial court erred in admitting in evidence excerpts of various documents generated by the Consumer Product Safety Commission (CPSC),[2] relating to the safety of ATVs. Defendants also argued that the trial court erred in denying their motion for a new trial on the basis of the discovery of new eyewitnesses to plaintiff's accident. Finally, they argued that the award of punitive damages was excessive and, therefore, violated their rights under Article I, section 16, of the Oregon Constitution[3] and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.[4]

The Court of Appeals held that the trial court did not err in admitting the excerpts from the CPSC documents, because

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trial court reduced the compensatory damage award by 20 percent and entered a judgment against defendants for $5,735,512.31.

[2] The Consumer Product Safety Commission is a federal agency that collects, investigates, analyzes, and disseminates information relating to the cause and prevention of death, injury, and illness associated with consumer products in the United States. 15 U.S.C. § 2054 (1991).

[3] Article I, section 16, of the Oregon Constitution, provides in part:

> "Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense."

[4] The Fourteenth Amendment to the Constitution of the United States provides in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law[.]"

that evidence was used for the limited and relevant purpose of showing defendants' knowledge of the allegedly dangerous characteristics of ATVs. *Oberg v. Honda Motor Co.*, 108 Or.App. 43, 47-48, 814 P.2d 517 (1991). The Court of Appeals also held that the trial court did not err in denying defendants' motion for a new trial on the basis of the discovery of new eyewitnesses to plaintiff's accident, because the trial court was entitled to find that the newly discovered evidence probably would not have changed the verdict. *Id.* at 55-56, 814 P.2d 517. With respect to punitive damages, the court held that the award did not violate defendants' rights under Article I, section 16, of the Oregon Constitution, because that provision "does not apply in civil actions between private parties." *Id.* at 49-50, 814 P.2d 517. Finally, the court held that the award of punitive damages did not violate defendants' rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. *Id.* at 50-55, 814 P.2d 517. We affirm the decision of the Court of Appeals.

ADMISSIBILITY OF CPSC DOCUMENTS

Defendants first argue that the trial court erred in allowing plaintiff to read to the jury excerpts from nine CPSC documents. The documents included seven CPSC internal staff memoranda on the safety of ATVs; a CPSC notice of proposed rulemaking and request for comments and data relating to the safety of ATVs; and a CPSC press release concerning ATV-related accidents and injuries.

A. *Relevance*

During the hearing on defendants' motion *in limine* to exclude documents generated by the CPSC, plaintiff argued that the disputed material was relevant to show that defendants had "notice" of the alleged dangerousness of ATVs and that the material was, therefore, relevant to two issues: the foreseeability of plaintiff's injury and defendants' reaction to the notice as bearing on punitive damages.

OEC 401 provides:

> "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

OEC 402 provides:

> "All relevant evidence is admissible, except as otherwise provided by the Oregon Evidence Code, by the Constitutions of the United States and Oregon, or by Oregon statutory and decisional law. Evidence which is not relevant is not admissible."

Defendants do not challenge the authenticity of the CPSC documents, and they stipulated that they had received each of the documents from which plaintiff read excerpts, at approximately the time of its publication. Defendants do not argue that their knowledge of ATVs' potential instability was irrelevant to the issues at trial. Rather, they argue that the other ATVs and the other accidents described in the disputed documents were so unlike this ATV and this accident that knowledge of the documents did not give defendants notice of anything relevant.

First, defendants contend that the ATVs that were the subject of the CPSC documents were not "substantially similar" to the Honda ATV that allegedly caused the injury in this case. We are unpersuaded. The CPSC documents dealt with ATVs as a class of vehicles. As one of the documents stated, vehicles of that class are of similar design. The trial court was entitled to find that the ATVs that were the subject of the CPSC documents were sufficiently similar to the ATV that caused the injury in this case to provide notice to defendants of danger to persons in plaintiff's position.

Second, defendants contend that the accidents that were referred to or described in the CPSC documents were not "substantially similar" to the accident that caused plaintiff's injury here. Again, we disagree with defendants' contention. One of the excerpts at issue concerned reports of the instability of ATVs as a class. Another concerned reports showing a "pattern of loss of control" specifically associated with ATVs manufactured by Honda. Three excerpts concerned reported incidents in which ATVs overturned backward, and three others more specifically concerned incidents in which ATVs overturned backward while climbing hills. As noted, the ninth excerpt concerned the similarity in configuration among all brands of ATVs. The trial court was entitled to find that the prior occurrences that were described in those excerpts were sufficiently similar to the accident at issue in this case to make those occurrences relevant.

In summary, the excerpts from the CPSC documents, admitted by the trial court, were relevant to issues at trial. The trial court did not err in so holding.

B. *Hearsay*

We next consider defendants' argument that, even if the excerpts from the CPSC documents were relevant to the issue whether defendants had notice of the dangerousness of the product, those excerpts were inadmissible because they were hearsay. OEC 801(3) provides:

> "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

Defendants' hearsay objections were not well taken, because the excerpts from the CPSC documents were not offered to prove the truth of the matters asserted therein. Rather, those excerpts were offered for the limited and proper purpose of showing that defendants had knowledge of the

potential dangerousness of ATVs. *See* Kirkpatrick, Oregon Evidence 484-85 (2d ed. 1989) ("[m]any out-of-court statements may be received in evidence because they are not being offered for the truth of the matter asserted," but for some other purpose, including the purpose of showing that the recipient of the statement had knowledge of the matter asserted therein).

It is clear that the trial court admitted the documents for the limited purpose for which plaintiff offered them. The court gave the following instruction just before the excerpts of CPSC documents were read to the jury:

> "Jurors, I am now going to permit plaintiff's counsel to read to you excerpts from some documents of the federal agency. The documents that I will allow plaintiff's counsel to read to you are not admitted for the purpose of establishing the truth of the statements contained in those documents. That means that you should not assume that the statements in those documents are true.
>
> "These documents are admitted for the limited purpose of notice. Plaintiff has alleged that these documents gave defendants notice before the date of [plaintiff's] accident that the [ATVs] could overturn.
>
> "I will not suggest to you that these documents constitute adequate notice. The adequacy of the notice is an issue for you to decide. The statements contained in these documents, the ones that will be read to you, may or may not be true. But we are not going to resolve their truth in this courtroom. In other words, they are coming in for a limited purpose on the basis that the plaintiff has alleged that [Defendants] had notice, and this is the evidence that's submitted to you and you will make that ultimate determination."

After plaintiff's counsel read the excerpts, the trial court told the jury:

> "Jurors, again, I want to review with you the limitation that the Court has placed on this information. First, I want to remind you that you should not assume that these statements are true. The plaintiff claims that the excerpts that the lawyer just read to you gave [defendants] notice before plaintiff's accident that [ATVs] could overturn, and I'm not suggesting to you that the excerpts just read to you constitute adequate notice. That will be an issue that you will have to decide."

The CPSC documents were not excludable as hearsay.

C. *Prejudice*

Defendants argued that the probative value of each of the CPSC documents was substantially outweighed by its prejudicial effect. In *State v. Pinnell*, 311 Or. 98, 112, 806 P.2d 110 (1991), this court explained:

> "Under OEC 403, relevant evidence is admissible so long as its probative value is not 'substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence.'
>
> "OEC 403, like its federal counterpart, FRE 403,
>
> "'requires the trial judge to go through a conscious process of balancing the costs of the evidence against its benefits. Unless the judge concludes that the probative worth of the evidence is "substantially outweighed" by one or more of the countervailing factors, there is no discretion to exclude; the evidence must be admitted.'" (Quoting Wright & Graham, 22 Federal Practice and Procedure 263-64.)

The record in this case demonstrates that the trial court went through the conscious process that is required. The court carefully considered the evidentiary costs and benefits of the CPSC documents and concluded that the probative value of those documents was not substantially outweighed by the danger of unfair prejudice. The record permitted a reasonable trial court to draw that conclusion. Having permissibly drawn that conclusion, the trial court was required then to admit the disputed evidence. There was no error.

D. *Conclusion*

The excerpts from the CPSC documents were authentic, were relevant, and were not hearsay. The trial court did not err in admitting them.

NEWLY DISCOVERED EVIDENCE

We next consider defendants' argument that the trial court erred in denying their motion, made pursuant to ORCP 64B(4)[5] and ORCP 71B(1)(b),[6] for a new trial based on the

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[5] ORCP 64B(4) provides:

> "A former judgment may be set aside and a new trial granted in an action where there has been a trial by jury on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:
>
> > "(4) Newly discovered evidence, material for the party making the application, which such party could not with reasonable diligence have discovered and produced at trial."

[6] ORCP 71B(1)(b) provides:

> "On motion and upon such terms as are just, the court may relieve a party or such party's legal representative from a judgment for the following reasons: * * * (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 64F[, requiring that a motion for a new trial be filed within 10 days after the entry of the judgment sought to be set aside]."

discovery, after trial, of two eyewitnesses to part of the incident giving rise to plaintiff's injury. The witnesses were a man and his daughter, who was seven years old at the time of plaintiff's accident. Defendants assert that the testimony of those witnesses would have disputed the testimony of the only other eyewitnesses to the accident – plaintiff's two brothers – in regard to plaintiff's location at the time he began the maneuver that culminated in his accident and in regard to his speed and his position on the ATV during the maneuver. Defendants argue that, because the witnesses would have provided the jury with "important new evidence" on many basic facts of the accident and because they were the only unbiased witnesses to the incident, it was probable that their testimony would have changed the outcome of the trial.

Plaintiff responds that, because the eyewitnesses did not see the ATV turn over, but only saw plaintiff as he started up the hill and again after he had been injured, the testimony of the eyewitnesses "provided no new insight into the nature of plaintiff's accident."

This court has not previously considered what factors a trial court should weigh in ruling on a motion for a new trial, under ORCP 64B(4), based on the discovery of new evidence. ORCP 64B(4) is, however, materially identical to *former* OCLA 5-802(4) and *former* ORS 17.610(4). In reviewing the denial of motions made under those statutes, this court consistently stated that applications for a new trial based on newly discovered evidence are not favored and that the grant or denial of such motions is within the sound discretion of the trial court. See *Skoog v. Minkoff*, 260 Or.

148, 150-51, 488 P.2d 1364 (1971) (stating that principle); *Larson v. Heintz Const. Co.*, 219 Or. 25, 72, 345 P.2d 835 (1959) (same); *Newbern v. Exley Produce Express*, 208 Or. 622, 630-33, 303 P.2d 231 (1956) (same); *State v. Davis*, 192 Or. 575, 579, 235 P.2d 761 (1951) (same). In *State v. Davis*, *supra*, 192 Or. at 579, 235 P.2d 761, this court also stated:

> "Newly discovered evidence which will justify a court in granting a new trial must meet the following requirements:
>
> > "'(1) It must be such as will probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it must be such as, with due diligence, could not have been discovered before the trial; (4) it must be material to the issue; (5) it must not be merely cumulative; (6) it must not be merely impeaching or contradicting of former evidence.' § 5-802, O.C.L.A." (Citation omitted.)

The trial court in this case found that there was no lack of diligence by defendants in their efforts to locate the witnesses before trial. *See* ORCP 64B(4) (stating that prerequisite for granting a new trial for reason of newly discovered evidence); *State v. Davis*, *supra* (same under former law). After reviewing affidavits from the newly discovered witnesses and other information pertaining to their expected testimony, however, the trial court found that "the newly discovered evidence probably would not have changed the result" of the trial.

We conclude that, first, the trial court did not err in applying that standard to the newly discovered evidence. *See* ORCP 64B (new trial may be granted for specified "causes materially affecting the substantial rights" of aggrieved party); *State v. Davis*, *supra* (under former law, stating test

of probable change of result). Second, having reviewed the evidence, we conclude that the trial court did not abuse its discretion in denying the motion. We note, as did the Court of Appeals, the length of time between the accident and the witnesses' statements (four years), the daughter's young age at the time of the accident, the distance from which the witnesses observed plaintiff, the fact that neither witness actually saw the accident, and the fact that the father said that he did not disagree with plaintiff's testimony. Those factors suggest that the newly discovered evidence probably would not have changed the result of the trial.

The trial court did not err in denying defendants' motion for a new trial on the basis of the discovery of the new witnesses.

CONSTITUTIONALITY OF THE AWARD OF PUNITIVE DAMAGES

We next turn to defendants' constitutional arguments. We first consider defendants' state constitutional claim. See *State v. Kennedy*, 295 Or. 260, 262, 666 P.2d 1316 (1983) (court considers state constitutional claims before federal ones).

A. *Article I, section 16*

Defendants argue that the award of punitive damages in this case violated their rights under Article I, section 16, of the Oregon Constitution, set out in note 3, *supra*, to be free from "excessive fines" and from penalties not "proportioned to the offense." This court has not previously considered the application of that constitutional provision to a civil award of punitive damages.

We begin by examining the text and context of the provision. *See Priest v. Pearce*, 314 Or. 411, 415-19, 840 P.2d 65 (1992) (setting out method of construing another provision of Oregon Constitution). The first sentence of Article I, section 16, refers to what may be done before and

after conviction of a crime. Article I, section 16, limits the amount of bail that may be required; bail relates to criminal proceedings. See Article I, section 14 (providing that offenses other than murder and treason shall be bailable). The first sentence of Article I, section 16, further specifies that "excessive fines" may not be imposed. That limitation follows the reference to bail and precedes two sentences relating only to criminal cases. Moreover, at the time that the Oregon Constitution was drafted (as now), a "fine" commonly referred to a criminal penalty. *See* Burrill's Law Dictionary, Part 1, at 491 (1850) ("Fine" means "[a] payment of money imposed upon a party as a punishment for an offence [*sic*]." "To fine" means "[to] impose a pecuniary punishment; to order, adjudge or sentence that an offender pay a certain sum of money as a punishment for his offence [*sic*].").

The second sentence of Article I, section 16, uses two terms that refer to crimes: "punishments" and "offense." Those terms appear in the two preceding constitutional provisions, where they clearly refer only to crimes. Article I, section 14, relates to bail for criminal "offences" [*sic*], and Article I, section 15, uses the word "punishment" to refer to punishment for crime. *See State v. Wagner*, 305 Or. 115, 212, 752 P.2d 1136 (1988) (Linde, J., dissenting) ("principles of humane *penal* laws" are "enshrined" in Article I, section 15, and Article I, section 16 (emphasis added)).

The final sentence of Article I, section 16, specifies that it applies "[in] all criminal cases whatever." That sentence mentions civil cases only as a benchmark, further suggesting that the section does not itself apply to civil cases.

Reading Article I, section 16, as a whole, and in context, we conclude that it applies only to criminal cases.

History does not disprove what the text demonstrates. Article I, section 16 was modeled after the equivalent provision of the Indiana Constitution. Carey, *The Oregon*

Constitution and Proceedings and Debates of the Constitutional Convention of 1857 468 (1926). We have found no Indiana court decision or other source antedating Oregon's adoption of the Indiana provision, which might inform us as to what the framers of our constitution understood. *See Priest v. Pearce*, *supra*, 314 Or. at 418-19, 840 P.2d 65 (so stating).

We hold that Article I, section 16, of the Oregon Constitution, does not apply to civil awards of punitive damages. The award of punitive damages in this case, therefore, does not violate Article I, section 16.

B. *Due Process*

Finally, defendants argued on appeal that, because the award of punitive damages in this case was the product of an exercise of standardless discretion by the jury and was "excessive" and "disproportionate," it violated the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, set out at note 4, *supra*. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), which defendants cite in support of this argument, was decided after the trial in this case. In this court, defendants rely on *Haslip* for the proposition that, to afford due process, an award of punitive damages must be subject to comprehensive post-verdict trial and appellate court review and that, because Article VII (Amended), section 3, of the Oregon Constitution[7] restricts the power of Oregon

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[7] Article VII (Amended), section 3, of the Oregon Constitution, provides in part:

> "In actions at law, where the value in controversy shall exceed $200, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict."

trial and appellate courts to conduct such a review, the required safeguards were absent here.

In response, plaintiff contends that, in approving Alabama's procedure for awarding punitive damages in *Pacific Mut. Life Ins. Co. v. Haslip*, *supra*, the United States Supreme Court did not establish standards for such awards beyond the general requirements of "reasonableness" and of "adequate guidance" to the jury by the trial court. Plaintiff also contends that the award of punitive damages in this case met those standards.

Because of its significance to our decision here, we begin by examining in detail the decision of the United States Supreme Court in *Pacific Mut. Life Ins. Co. v. Haslip*, *supra*.[8] In that case, the health insurance policies of four insureds lapsed after an agent of the insurer misappropriated their premium payments. The insureds brought an action for fraud against the insurer. The trial court instructed the jury

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In *Van Lom v. Schneiderman*, 187 Or. 89, 110-13, 210 P.2d 461 (1949), this court held that the assessment of punitive damages, because it is a matter "committed to the decision of a jury," is a question of fact to which the prohibition in Article VII, section 3 (now Article VII (amended), section 3), applies. See *Friendship Auto v. Bank of Willamette Valley*, 300 Or. 522, 537, 716 P.2d 715 (1986) (where there was evidence from which the jury could have found that the defendant acted with malice, so as to be liable for punitive damages, the trial court erred under Article VII (Amended), section 3, in entering a judgment for the defendant notwithstanding the jury verdict).

[8] On March 31, 1993, the United States Supreme Court heard oral argument in *TXO Production Corp. v. Alliance Resources*, *cert. granted* ____ U.S. _____, 113 S.Ct. 594, 121 L.Ed.2d 532 (1992) (case below, 187 W.Va. 457, 419 S.E.2d 870), a West Virginia case involving a due process challenge to an award of punitive damages.

that, if it found liability for fraud, it could award punitive damages to the plaintiffs.

The jury awarded punitive damages; the trial court approved the award, and the Alabama Supreme Court affirmed it on appeal. The insurer sought certiorari in the United States Supreme Court, on the ground that the award of punitive damages was the product of unbridled jury discretion and that it therefore violated the insurer's rights under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

In considering that assertion, the United States Supreme Court noted that "[p]unitive damages have long been a part of traditional state tort law," *Pacific Mut. Life Ins. Co. v. Haslip*, *supra*, 499 U.S. at _____, 111 S.Ct. at 1041, and that the common-law method of assessing those damages was not *per se* unconstitutional, *id.* at ____, 111 S.Ct. at 1042-43. The Court described the common-law method as follows:

> "Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable."

Id. at ____, 111 S.Ct. at 1042. The Court noted that, on previous occasions, it had approved awards of punitive damages even where the "discretion of the jury * * * [was] not controlled by any very definite rules" and where "there was no statute fixing a maximum penalty, no rule for measuring damages, and no hearing." *Ibid.*

The Court cautioned, however, that the mere fact that punitive damages "have been recognized for so long" did not mean that "their imposition is never unconstitutional." Expressing concern about "punitive damages 'run wild,'" the

Court concluded that it must "determine whether the Due Process Clause renders the punitive damages award in this case constitutionally unacceptable." *Id.* at ___, 111 S.Ct. at 1043.

The Court's analysis proceeded as follows:

> "One must concede that unlimited jury discretion – or unlimited judicial discretion for that matter – in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus. * * *
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> "* * * * *
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> "1. We have carefully reviewed the instructions [given] to the jury [by the Alabama court in this case].[9] By these instructions, the trial court ex-

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[9] The trial court's instructions in that respect stated:

> "Now, if you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion, when I use the word discretion, I say you don't have to even find fraud, you wouldn't have to, but you may, the law says you may award an amount of money known as punitive damages.
>
> "This amount of money is awarded to the plaintiff but it is not to compensate the plaintiff for any injury. It is to punish the defendant. * * *
>
> "Now, the purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiffs,

> pressly described for the jury the purpose of punitive damages. * * *
>
> "To be sure, the instructions gave the jury significant discretion in its determination of punitive damages. But that discretion was not unlimited. It was confined to deterrence and retribution, the state policy concerns sought to be advanced. And if punitive damages were to be awarded, the jury 'must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong.' * * *
>
> "These instructions, we believe, reasonably accommodated [the defendant's] interest in rational decisionmaking and Alabama's interest in meaningful individualized assessment of appropriate deterrence and retribution. * * * As long as the discretion is exercised within reasonable constraints, due process is satisfied.
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> "2. Before the trial in this case took place, the Supreme Court of Alabama had established post-trial procedures for scrutinizing punitive awards. In

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> * * * by way of punishment of the defendant and for the added purpose of protecting the public by detering [*sic*] the defendant and others from doing such wrong in the future. Imposition of punitive damages is entirely discretionary with the jury. * * *
>
> "Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong."

As required by Alabama law, evidence of the defendant's financial worth was not submitted to the jury. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, ___, 111 S.Ct. 1032, 1037 n.1, 1044, 113 L.Ed.2d 1 (1991).

Hammond v. City of Gadsden, 493 So. 2d 1374 (1986), it stated that trial courts are 'to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages.' Among the factors deemed 'appropriate for the trial court's consideration' are the 'culpability of the defendant's conduct,' the 'desirability of discouraging others from similar conduct,' the 'impact upon the parties,' and 'other factors, such as the impact on innocent third parties.' The *Hammond* test ensures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages.

"3. By its review of punitive awards, the Alabama Supreme Court provides an additional check on the jury's or trial court's discretion. It first undertakes a comparative analysis. It then applies the detailed substantive standards it has developed for evaluating punitive damages. In particular, it makes its review to ensure that the award does 'not exceed an amount that will accomplish society's goals of punishment and deterrence.' *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (1989)[.] This appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.

"Also before its ruling in the present case, the Alabama Supreme Court had elaborated and refined the *Hammond* criteria for determining whether a punitive award is reasonably related to the goals of deterrence and retribution. *Hornsby*, [*supra*]. It was announced that the following could be taken into consideration in determining whether the award was excessive or inadequate: (a) whether there is a reasonable relationship between the punitive damages

award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and having the defendant also sustain a loss; (d) the 'financial position' of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

"The application of these standards, we conclude, imposes a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages. * * *

"* * * The standards provide for a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter. They surely are as specific as those adopted legislatively in [Ohio] and [Montana].

"[The insurer] had the benefit of the full panoply of Alabama's procedural protections. The jury was adequately instructed. The trial court conducted a post-verdict hearing that conformed with *Hammond*. * * * [The Supreme Court of Alabama] applied the *Hammond* standards and approved the verdict thereunder. It brought to bear all the relevant factors recited in *Hornsby*.

"We are aware that the punitive damages award in this case is more than 4 times the amount of compensatory damages, is more than 200 times the

> out-of-pocket expenses of [the plaintiff], and, of course, is much in excess of the fine that could be imposed for insurance fraud [under Alabama law]. * * * While the monetary comparisons are wide and, indeed, may be close to the line, the award here did not lack objective criteria. We conclude, after careful consideration, that in this case it does not cross the line into the area of constitutional impropriety. Accordingly, [the defendant's] due process challenge must be, and is, rejected."

499 U.S. at _____, 111 S.Ct. at 1043-46 (footnotes omitted; some citations omitted).

In summary, the Supreme Court first identified the constitutional interests required to be safeguarded in the determination of an award of punitive damages: the constitutional interest in ensuring that the finder of fact has "adequate guidance" in making such an award and the constitutional interest in ensuring that the amount of the resulting award is "reasonable." *Pacific Mut. Life Ins. Co. v. Haslip*, *supra*, 499 U.S. at _____, 111 S.Ct. at 1043.[10] The Court then

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[10] Although the Supreme Court does not use the terms, we interpret those two interests to coincide with the constitutional interests in procedural and substantive due process. A commentator explains that procedural due process in the context of an award of punitive damages relates to the requirement that the procedure employed in making that award be fundamentally fair; substantive due process in that context relates to the requirement that the amount of the award be proportional to the defendant's conduct and may also be implicated when multiple awards of punitive damages are made against the same defendant for the same course of conduct. May, *Fashioning Procedural and Substantive Due Process Arguments in Toxic and Other Tort Actions Involving Punitive Damages After* Pacific Mutual Life Insurance Co. v. Haslip, 22 Envtl L 573, 587-88, 606-07 (1992). Multiplicity of awards is not an issue in this case.

identified the criteria that are applied in Alabama when a jury makes, or a court approves, an award of punitive damages. Finally, the Court determined that the application of those criteria adequately safeguarded the constitutional interests identified, because the criteria "impose[d] a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages," *id.* at ___, 111 S.Ct. at 1045, and because the criteria "provide[d] for a rational relationship" between the amount of an award and a defendant's conduct, the need for punishment, and the need for deterrence, *id.* at ____, 111 S.Ct. at 1045-46.

We apply an equivalent analysis to the procedure for determining awards of punitive damages in Oregon product liability actions, to ascertain whether that procedure, although differing in some respects from the Alabama procedure, also adequately safeguards the due process rights of defendants in this state. We begin by setting out the statute establishing the substantive criteria to be considered by Oregon factfinders in deciding, in product liability actions, whether to make awards of punitive damages and in setting the amounts of those awards. ORS 30.925 provides:

> "(1) In a product liability civil action, punitive damages shall not be recoverable unless it is proven by clear and convincing evidence that the party against whom punitive damages is sought has shown wanton disregard for the health, safety and welfare of others.
>
> "(2) During the course of trial, evidence of the defendant's ability to pay shall not be admitted unless and until the party entitled to recover establishes a prima facie right to recover under subsection (1) of this section.
>
> "(3) Punitive damages, if any, shall be determined and awarded based upon the following criteria:

"(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;

"(b) The degree of the defendant's awareness of that likelihood;

"(c) The profitability of the defendant's misconduct;

"(d) The duration of the misconduct and any concealment of it;

"(e) The attitude and conduct of the defendant upon discovery of the misconduct;

"(f) The financial condition of the defendant; and

"(g) The total deterrent effect of other punishment imposed on the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected."

In addition, ORS 41.315 provides:

"(1) Except as otherwise specifically provided by law, a claim for punitive damages shall be established by clear and convincing evidence.

"(2) In a civil action in which a party seeks punitive damages from another party, evidence of the financial condition of a party shall not be admissible until the party seeking such damages has presented evidence sufficient to justify to the court a prima facie claim of punitive damages."[11]

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[11] Defendants do not claim that the trial court failed to instruct the jury concerning the statutory criteria or that the jury did not properly apply those criteria. The trial court instructed the jury as

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follows:

"Punitive damages: If you have found that plaintiff is entitled to general damages, you must then consider whether to award punitive damages. Punitive damages may be awarded to the plaintiff in addition to general damages to punish wrongdoers and to discourage wanton misconduct.

"In order for plaintiff to recover punitive damages against the defendant[s], the plaintiff must prove by clear and convincing evidence that defendant[s] have shown wanton disregard for the health, safety, and welfare of others.

"* * * * *

"If you decide this issue against the defendant[s], you may award punitive damages, although you are not required to do so, because punitive damages are discretionary.

"In the exercise of that discretion, you shall consider evidence, if any, of the following:

"First, the likelihood at the time of the sale [of the ATV] that serious harm would arise from defendants' misconduct.

"Number two, the degree of the defendants' awareness of that likelihood.

"Number three, the duration of the misconduct.

"Number four, the attitude and conduct of the defendant[s] upon notice of the alleged condition of the vehicle.

"Number five, the financial condition of the defendant[s].

"And the amount of punitive damages may not exceed the sum of $5 million."

More generally:

"'Punitive damages are allowed in Oregon to punish a willful, wanton or malicious wrongdoer and to deter that wrongdoer and others similarly situated from like conduct in the future. *Martin v. Cambas*, 134 Or 257, 293 P2d 601 (1930); *accord Noe v. Kaiser Foundation Hospitals*, 248 Or 420, 435 P2d 306 (1967).' *State ex rel Young v. Crookham*, 290 Or 61, 65, 618 P.2d 1268 (1980). Punitive damages 'are not a substitute for compensatory awards nor an offset against litigation expense.' *Id.*; *see also Andor v. United Air Lines*, 303 Or. 505, 511-13, 516-17, 739 P.2d 18 (1987). * * *

"* * * [T]he appropriate line of analysis that this Court has said a jury should follow in cases involving potential awards of punitive damages [is]:

> "'[t]he finder of fact must determine what punitive damages, if any, to award based on the proper premise of deterring future similar misconduct by the defendant or others. To this end, a number of factors may be relevant, including the seriousness of the hazard to the public, the attitude and conduct of the wrongdoer upon learning of the hazard, the number and position of employees involved in causing or covering up the misconduct, the duration of the misconduct and/or its cover-up, the financial condition of the wrongdoer, and prior and potential punishment from similarly situated plaintiffs or other sources.'"

"*State ex rel Young v. Crookham*, *supra*, 290 Or at 72 [618 P.2d 1268]." *Honeywell v. Sterling Furniture Co.*, 310 Or. 206, 210-11, 797 P.2d 1019 (1990).

In summary, in Oregon, as in Alabama, the factfinder must consider the "culpability" of a defendant. ORS

30.925(1); *Haslip*, *supra*, 111 S.Ct. at 1044. "Objective" criteria, *see Haslip*, *supra*, 499 U.S. at ____, 111 S.Ct. at 1046, considered in Alabama, and required to be considered in Oregon product liability actions, include the likelihood of harm from a defendant's conduct, the duration and profitability of the conduct, the defendant's awareness or concealment of it, the defendant's financial position, and the imposition of other sanctions on the defendant.[12] Oregon law also provides an extra precaution; a plaintiff must prove entitlement to punitive damages by clear and convincing evidence, rather than a mere preponderance. ORS 30.925(1); ORS 41.315(1). We conclude that, in product liability actions in Oregon, as in Alabama cases, application of objective criteria ensures that sufficiently definite and meaningful constraints are imposed on the finder of fact and ensures that the resulting award is not disproportionate to a defendant's conduct and to the need to punish and deter.

Neither is the Oregon procedure in product liability actions rendered unconstitutional by the fact that objective criteria are applied during the factfinder's *initial* determination of the amount of an award of punitive damages, rather than during post-verdict or appellate review of the award. We do not interpret *Haslip* to hold that an award of punitive damages, to comport with the requirements of the Due Process Clause, always must be subject to a form of post-verdict or appellate review that includes the possibility of remittitur. *See* May, *Fashioning Procedural and Substantive Due Process Arguments in Toxic and Other Tort Actions*

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[12] The Oregon statutory criteria are almost identical to the criteria established in the Ohio statute that is noted approvingly by the Supreme Court in *Haslip*. 499 U.S. at ____, 111 S.Ct. at 1046. In Ohio, however, the criteria are applied by the trial court after the factfinder – whether a jury or the court – determines that the defendant is liable for punitive damages. Ohio Rev Code Ann § 2307.80.

Involving Punitive Damages After Pacific Mutual Life Ins. Co. v. Haslip, 22 Envtl L 597, 601 (stating that *Haslip* leaves open that question); *Union Nat. Bank of Little Rock v. Mosbacher*, 933 F.2d 1440, 1447-48 (8th Cir. 1991) (reviewing the *Haslip* decision and stating that the Supreme Court considered Alabama's jury instructions, post-trial scrutiny, and appellate review to be "significant factors" in determining the constitutionality of that state's procedure).[13] Rather, in *Haslip*, the Court determined only that the Alabama procedure, as a whole and in its net effect, did not violate the Due Process Clause. *See Pacific Mutual Life Ins. Co. v. Haslip*, *supra*, 499 U.S. at _____, 111 S.Ct. at 1043 (Court's task was to determine whether the Due Process Clause rendered constitutionally unacceptable the punitive damages award in that case).

Similarly, we believe that Oregon's procedure in product liability actions – as a whole and in its net effect – is constitutional. If anything, initial application of the constitutionally sufficient objective criteria enumerated in ORS 30.925, rather than post-hoc application of those criteria, increases the protective effect of the criteria. *See Haslip*,

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[13] The California Supreme Court, considering the decision of the United States Supreme Court in *Haslip*, *supra*, in the context of the limited question whether a defendant's financial condition is a proper criterion for consideration in the assessment of punitive damages, stated in *dictum* that *Haslip* "has made clear a constitutional mandate for meaningful judicial scrutiny of punitive damage awards." *Adams v. Murukami*, 54 Cal.3d 105, 284 Cal.Rptr. 318, 326, 813 P.2d 1348, 1356 (1991). *See also Alexander v. Evander*, 88 Md.App. 672, 596 A.2d 687 (1991) (*Haslip* implicitly requires both standards to guide the jury's and trial court's discretion *and* judicial review of jury verdicts). To the extent that the statement of the California Supreme Court does not account for variations in pre-verdict procedures for determining punitive damage awards, we disagree with it.

supra, 499 U.S. at ____, 111 S.Ct. at 1060-61 (O'Connor, J., dissenting) (Alabama system violates due process, because that system vests standardless discretion *in the jury* to fix a penalty and provides for application of standards only on review of jury award; jury should be instructed in, and apply, Alabama criteria).

We also note that the trial court, after the verdict, and the appellate courts are not entirely powerless. If there is no evidence to support the jury's decision – in this context, no evidence that the statutory prerequisites for the award of punitive damages were met – then the trial court or the appellate courts can intervene to vacate the award. *See* ORCP 64B(5) (trial court may grant a new trial if the evidence is insufficient to justify the verdict or is against law); *Hill v. Garner*, 277 Or. 641, 643, 561 P.2d 1016 (1977) (judgment notwithstanding the verdict is to be granted when there is no evidence to support the verdict); *State v. Brown*, 306 Or. 599, 604, 761 P.2d 1300 (1988) (a fact decided by a jury may be re-examined when a reviewing court can say affirmatively that there is no evidence to support the jury's decision).

Moreover, appellate review is available to test the sufficiency of the jury instructions. *See* ORCP 59 H (prescribing method of preserving alleged instructional error for appeal). Thus, defendants in Oregon can obtain post-verdict review to ensure that the jury was instructed properly and that there was evidence to support the jury's award of punitive damages. *See also Honeywell v. Sterling Furniture Co.*, *supra*, 310 Or. at 210-14, 797 P.2d 1019 (holding that it was prejudicial error to instruct a jury that a portion of any punitive damages award would be used to pay the plaintiff's attorney fees and a portion would go to the Criminal Injuries Compensation Account, and reversing award of punitive damages).

Those procedural protections, in turn, ensure that an award of punitive damages in a product liability action bears a rational relationship to a defendant's conduct and to the need for punishment and deterrence. As the Fifth Circuit Court of Appeals noted in *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1382 (5th Cir. 1991):

> "Under *Haslip*, an award of punitive damages does not meet constitutional requirements unless the circumstances of the case indicate that the award is reasonable. This condition, contrary to the assertion of [the defendant], is not a vehicle for expansive appellate review of punitive damages awards. * * *
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> "* * * Accordingly, in reviewing the constitutionality of an award of punitive damages, a court may not explicitly or implicitly recalculate the award of damages; moreover, it may not express an opinion whether the award is too high or too low. Rather, the court may only consider whether the circumstances of the case offer some support for the amount of the award. If there are *any* circumstances of probative value that support the amount of the award, then that award meets the 'reasonableness' prong of the due process test in *Haslip*." (Footnote omitted; emphasis in original.)

The court added that:

> "the procedural protection adequate to support the constitutionality of a punitive damages award varies with the circumstances. * * * As long as there is some meaningful procedural assurance that the amount of the award is not an impulsive reaction to the wrongful conduct of the defendant, the award survives the procedural protection aspect of the due process analysis in *Haslip*." *Id.* at 1385.

The court concluded that the award of punitive damages in that case "did not lack support in the record." *Id.* at 1382. *See also Morgan v. Woessner*, 975 F.2d 629, 641 n.8 (9th Cir. 1992) (stating, in the context of the defendant's claim that the award of punitive damages violated due process, that the trial court's instructions to the jury – that the jury must find by clear and convincing evidence that the defendant was culpable, must consider the relationship between the award and the harm suffered by the plaintiff, must consider deterrence and retribution, must not make an award out of passion or prejudice, and must consider the defendant's financial worth – "appear to meet all the concerns of the *Haslip* court"); *Herman v. Sunshine Chemical*, 257 N.J. Super. 533, 608 A.2d 978, 983 (1992) ("[w]hether to award punitive damages and their amount is within the discretion of the trier of fact").[14]

We also note that the relatively narrow scope of appellate review of punitive damages awards in Oregon is similar to that available to federal appellate courts reviewing awards of punitive damages made in federal district courts applying state law in cases involving diversity jurisdiction. *See Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 280, 109 S.Ct. 2909, 2922-23, 106 L.Ed.2d 219 (1989) (noting the limited scope of review of punitive damage awards by federal appellate courts in cases involving diversity jurisdiction). In *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991), the Fourth Circuit Court of Appeals

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[14] In *Haslip*, the Court stated that the award of punitive damages, which was upheld, was more than 4 times the amount of compensatory damages and more than 200 times the amount of out-of-pocket expenses of the plaintiff. 499 U.S. at _____, 111 S.Ct. at 1046. The proportions here are similar. The award of punitive damages here is about 5.4 times the amount of compensatory damages and about 258 times the amount of out-of-pocket expenses of plaintiff. *See* note 1, *supra*.

reviewed an award of punitive damages made by a federal district court applying South Carolina law. The court noted that its scope of review was restricted in part by the Seventh Amendment to the Constitution of the United States, which applies only to federal courts and which provides:

> "'In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.'"

Id. at 99 and n.1.

The court examined the United States Supreme Court's approval of the Alabama system of determining punitive damages:

> "[*Haslip*'s] unusual approach of emphasizing post-verdict review to the extent of perhaps slighting a review of the pre-verdict process raises significant questions when federal courts, sitting in diversity cases, are confronted with the proper application of state punitive damages. The legitimizing constraints provided by the quasi *de novo* review process practiced under Alabama state law cannot be applied by a federal district court. * * *
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> "* * * * *
>
> "The law of South Carolina permits a jury to award punitive damages to punish, deter, and vindicate the rights of the plaintiff whenever the conduct of the defendant is willful, wanton or reckless. The plaintiff must prove by clear and convincing evidence that the conduct included a 'consciousness of wrongdoing' at the time of the conduct. Punitive damages may be awarded only if actual damages are awarded.

> "The amount of the penalty is committed to the discretion of the jury. The Supreme Court of South Carolina has repeatedly announced that no formula applies in awarding punitive damages and [that] their award and amount are 'peculiarly within the judgment and discretion of the jury * * *.' Thus, * * * there is no appropriate ratio between actual damages and punitive damages * * *. Similarly, there is no requirement that punitive damages bear any specified relationship to the wealth of the defendant. * * * Moreover, punitive damages awards would apparently be upheld in the absence of any evidence of the worth of the defendant.
>
> "The only constraint on the award by the jury is provided by the discretion given to the trial court to review the award for excessiveness. The review by the appellate court is under an abuse-of-discretion standard. The appellate court will reverse a trial court's refusal to set aside an award only when the award is '"so shockingly excessive as manifestly to show" that the jury was actuated by caprice, passion or prejudice.'
>
> "When the verdict is returned in a federal court * * *, no significantly greater restraint is provided.
>
> "* * * * *
>
> "Since the argument in this case, the Supreme Court of South Carolina [has] adopted * * * a more elaborate post-trial review to be conducted in the future by state trial courts in an attempt to avoid due process challenges. * * * [T]he court announced new factors to be considered * * *."

Id. at 99-100, 106. The factors announced by the South Carolina Supreme Court included the defendant's degree of culpability, the duration of the culpable conduct, the defen-

dant's awareness or concealment of it, the existence of similar past conduct, the likelihood that the award would deter the defendant or others from similar conduct, the determination whether the award is reasonably related to the harm likely to result from the conduct, the defendant's ability to pay, and "other factors" deemed appropriate. *Id.* at 106.

The Fourth Circuit concluded that the defendant in the diversity jurisdiction case before it was denied due process, because the jury making the award exercised the unconstrained discretion permitted to it by South Carolina law and because the state's newly elaborated substantive post-verdict constraints could not be applied by the federal appellate court. The court directed that, on remand, the federal district court "incorporate" those newly elaborated standards into its instructions to the jury. *Id.* at 105-10.

The Fourth Circuit later reached a similar result in its review of an award of punitive damages made in federal district court under Virginia law. *Johnson v. Hugo's Skateway*, 974 F.2d 1408 (4th Cir. 1992). Virginia law, like South Carolina law, provided minimal constraints on the discretion of juries in the determination of awards of punitive damages. *Id.* at 1415. The Fourth Circuit again concluded that the substantive criteria applied in Virginia's post-verdict review process in state court must be applied in federal court by the factfinder. *Id.* at 1418.

ORS 30.925 provides essentially the same protection to defendants as the Fourth Circuit granted to the defendants on remand in *Mattison* and *Johnson*. In contrast to the unconstrained discretion allowed to factfinders by South Carolina and Virginia law in those cases, the criteria established by ORS 30.925 are detailed and objective, resulting in their also being constitutionally sufficient. The criteria need not be applied in post-verdict or appellate review, but are permissibly – even preferably – applied by juries in the initial determination of punitive damages awards.

The jury in this product liability action was instructed properly about the substantive criteria to be applied in considering punitive damages. There was evidence to support its determination. Accordingly, the punitive damages award in this case did not violate the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

PETERSON, Justice, dissenting.

I disagree with the majority on two points. I would hold that the trial court erred in admitting the Consumer Product Safety Commission documents. Second, I believe that due process requires post-verdict review beyond that which the majority finds sufficient (which, essentially, is no post-verdict review).

The Consumer Product Safety Commission (CPSC) is a federal "independent regulatory commission" created by Congress to regulate consumer products, by protecting the public against unreasonable risks of injury associated with consumer products, assisting consumers in evaluating the comparative safety of consumer products, developing uniform safety standards for consumer products, and promoting research and investigation into the causes and prevention of product-related injuries and illnesses. 15 USC §§ 2051, 2053 (1991). The record shows that CPSC received product safety reports under a "NEISS" reporting system. Concerning the CPSC and the NEISS system, one witness testified:

> "Q. [BY DEFENSE COUNSEL]. What * * * is the function of the Consumer Products Safety Commission?
>
> "A. It's the federal agency charged by the Consumer Products Safety Act to monitor the safety of consumer products to provide consumers with comparative safety data on consumer products, and to take such actions as the legislation dictates to perform its function.
>
> "Q. You mentioned the NEISS Data System, and there's been reference to that earlier in this trial. My question first, sir, is could you give us an explanation of the NEISS System, including what that acronym means * * *.

> "A. * * * NEISS, National Electronic Injury Surveillance System, and it truly is an electronics surveillance system.
>
> "The Consumer Products Safety Commission pays an individual to work in currently it's about one and a half percent of all the hospital emergency rooms in the nation, and this is a carefully selected one and a half percent, to be statistically representative of the entire population of emergency rooms. * * * And in these hospitals, individuals are paid to acquire information from admitted patients to the emergency room on whether or not their injury was related to a consumer product. And the relationship has just got to be some sort of association or relation, that is, if you were standing on a chair to change a light bulb and you fell off the chair, that would likely be coded as light bulb related and chair related, even if you never got to the light bulb, because you were trying to get to the light bulb.
>
> "And along the same lines, if you stepped on a roller skate and ultimately fell down a stair, you would be coded that would get two product codes, related to stairs and roller skates, or so on down the line. As you can imagine the range. And the data is collected by product category, that is roller skates are a category, stair steps are a category. Light bulbs, incandescent are a category as opposed to light bulbs fluorescent, and so on down the line.
>
> "And there are 850 categories that are monitored. And the CPSC coder collects that information daily and transmits that information electronically to the Consumer Products Safety Commission in Washington. That's why it's the National Electronic Injury Surveillance System. The function of that system and the reason it is a daily entry is it is the

hope and the design of the system that if for instance a sudden – there was a sudden importation of toys from some Third World country that had tainted, say stuffed toy that had poisonous fur, it would be the hope of the system to begin to catch a sudden unanticipated rise in the poisonings associated with stuffed toys or child admissions to emergency rooms and would cause – it wouldn't be this monthly stuff that the emergency rooms would treat patients all month and then next month the paper would go to Washington.

"The next month they'd look at the paper and you would be three months into these toys before you figured out there was a problem. By transmitting that information electronically daily to the CPSC headquarters, they would hope to see a blip if it happened in one of their 50 categories, and take action.

"* * * *

"Q. Does the NEISS data in any way attempt to explain how accidents occurred or why?

"A. No. I mean basically what I've described to you is just about all the information you can put in a report. Even the product type itself is not described. In other words, you don't get a description of a Schwinn Bicycle, you get product code through something, it will be a four digit code for bicycles, two-wheel.[1]

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[1] This testimony is similar to the summary of the NEISS system described in Edward J. Heiden, Alan R. Pittaway, and Rosalind S. O'Connor, *Utility of the U.S. Consumer Product Safety Commission's Injury Data System as a Basis for Product Hazard Assessment*, 5 J Prod Liab 295, 295 & n 1 (1982):

"The U.S. Consumer Product Safety Commission (CPSC) has jurisdiction over approximately 10,000 products, with the power to recall, ban, regulate safety characteristics, or provide product safety information. The basis for all CPSC action is its system of health and safety data. The precision, accuracy, and reliability of these data are a critical issue for CPSC, consumers, and the business community dealing with liability considerations for CPSC-regulated products.

"One of the principal bases for CPSC's actions is the National Electronic Injury Surveillance System (NEISS), a reporting system based on product-associated injuries that occur in a national sample of emergency rooms within approximately seventy-five hospitals. NEISS is used as a basis to obtain estimates of the total of all national medically attended injuries associated with the great majority of consumer products.[1] The national estimates consist of three methodological elements: (1) recording of injury data, in terms of product(s) associated with that injury, from the sample of emergency room visits (ERVs); (2) projection of sample data upward to an estimate for the total universe of all emergency room product-related injury visits; and (3) projection of total national emergency room injuries from (2) to a total for all medically attended injuries.

"1. Injuries associated with consumer products are reported via teletype either by in-house hospital personnel or contractor personnel to a central computer on a frequent basis – usually daily – for several hundred general product codes. Each injury report indicates a product, the type of injury involved, and provides information about the victim and the injury – age, sex, injury diagnosis, body part involved, locale, date of treatment, whether the victim was treated and released, was hospitalized, or was dead on arrival at the emergency room. A subset of these cases is selected for in-depth follow-up investigation for products of special interest to

"* * * *

"Q. Dr. McCarthy, is there another level or layer of data collection utilized by the CPSC?

"A. There are several.

"Q. What's the next layer?

"A. Occasionally there will be what's called the term for it is an IDI, an In-Depth Investigation, IDI. And most of the time that's a phone call. I mean it's called an In-Depth Investigation, but overwhelmingly that's a phone call.

"Q. Would you describe in a little greater detail what kinds of data and how it's collected in the IDI process

"A. Well, IDIs can occur, an In-Depth Investigation can occur for any number of reasons and take any number of forms, but most of the time they will be an injury and something will look interesting, or for some reason the product category will be flagged that month for IDIs, and one will make a follow-up phone call to the residence of the individual who was treated at the hospital, because when you get admitted to a hospital, especially when the NEISS coder is there, they've got your phone number, right? So they can call your home. Now, there's no real requirement, and indeed it's not uncommon for a quarter or a third of these In-Depth Investigations not even to talk to a witness. Someone does have to answer the phone. And they talk to them about the nature of the injury, the accident, they may or may not be a witness, just generally what happened, if someone knows; if they don't know or won't talk to

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CPSC staff or Commissioners."

them, that may be it. Most of the time that is it. After the phone call, that's the end of the investigation."

The NEISS statistics included information about all ATVs, irrespective of who the manufacturer was or how the accident happened.

At the end of plaintiff's case-in-chief, copies of nine CPSC documents were received in evidence, over the objections of defendants. Copies of the exhibits are set forth in the Appendix. The exhibits include three kinds of information:

1. Interoffice memoranda containing information about ATV accidents reported to CPSC.

2. Interoffice memoranda containing opinions of CPSC personnel concerning the safety or design of ATVs.

3. CPSC notices concerning ATVs.

The majority holds that all the documents were relevant and admissible. I disagree.

OEC 801(3) provides:

> "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

Plaintiff asserts that these exhibits were "offered to prove notice to Defendants of [their] contents, not for the truth of the matter asserted, and therefore [were] not hearsay." Plaintiff read the *nine* exhibits – Exhibits 20, 23, 25, 28, 31, 37, 120, 121, and 122 – to the jury. Before the exhibits were read to the jury, the trial judge told the jury:

> "Jurors, I am now going to permit plaintiff's counsel to read to you excerpts from some documents of the federal agency. The documents that I

will allow plaintiff's counsel to read to you are not admitted for the purpose of establishing the truth of the statements contained in those documents. That means that you should not assume that the statements in those documents are true.

"These documents are admitted for the limited purpose of notice. Plaintiff has alleged that these documents gave defendants notice before the date of the Oberg's [*sic*] accident that the ATVs could overturn.

"I will not suggest to you that these documents constitute adequate notice. The adequacy of the notice is an issue for you to decide. The statements contained in these documents, the ones that will be read to you, may or may not be true. But we are not going to resolve their truth in this courtroom. In other words, they are coming in for a limited purpose on the basis that the plaintiff has alleged that Honda had notice, and this is the evidence that's submitted to you and you will make that ultimate determination."

The trial judge's decision on the "other accidents" evidence was made after days of discussions between the trial judge and the lawyers on the subject. On April 3, 1990, after an extensive discussion between the trial judge and counsel, the court stated:

> "Now, we're going to have to have a subdivision because I recognize that there is going to be controversy on the word 'stability,' so the first criterion is that before a document will be considered by the Court, it has to deal with lack of stability

> "Then that will be divided into two components, instability, which relates to rearward – what do you call that?
>
> "[DEFENDANTS' LAWYER]: Rearward turnover.
>
> "[PLAINTIFF'S LAWYER]: Flips, Your Honor.
>
> "THE COURT: – which reasonably is similar to the normal test of similarity of our accident. And then the other criteria are those things which the Plaintiff is saying that this report deals with instability in general.
>
> "I'm signaling the Plaintiff's team that you are going to have difficulty in convincing me that general instability will be adequate, but I'll certainly look at every document you want me to look at."

Seven of the nine exhibits are internal office memoranda, one (Exhibit 122) is a CPSC press release, and one (Exhibit 37) is a notice of proposed rulemaking published in the Federal Register.

There actually are two issues concerning the admissibility of the CPSC documents. One concerns the admissibility of the CPSC documents in light of the evidentiary rule that limits evidence of other accidents. The second issue concerns the admissibility of opinions contained in a public agency's records. I first discuss the evidence of other accidents.

Both parties appear to agree as to the rule applicable to evidence of other accidents. *Rader v. Gibbons and Reed Co.*, 261 Or. 354, 359, 494 P.2d 412 (1972), states the rule as follows:

> "Evidence of prior similar occurrences is admissible under some circumstances in a negligence action. As a general rule, evidence of prior accidents or acts

of negligence is not admissible to prove a specific act of negligence. Such evidence is, however, admissible to prove the existence of a continuing defect or a continuing course of negligent conduct, and that the condition or course of conduct is in fact dangerous, or that the defendant had notice of its dangerous character. *The admissibility of such evidence for these purposes is, however, subject to the requirement that the prior accidents must have occurred under similar conditions and circumstances.*" (Emphasis added; citations omitted.)

This court, in a long line of cases, has held that, in a negligence case, evidence of prior accidents is not admissible "to prove a specific act of negligence." Such evidence may be admissible, however, as notice to a defendant of, among other things, a dangerous condition. In *Rader*, the plaintiff's decedent was killed when the windshield in the car in which the decedent was riding was struck by a falling rock. A policeman who regularly patrolled the area testified that, on previous occasions, large trucks carried rock on the haul road. There was evidence that shows that rocks had fallen onto the highway from the haul road, and that the defendant was aware of this. The court upheld the ruling admitting the evidence, saying that "the evidence objected to tended to show both the existence of a dangerous condition and that defendant had notice of the dangers. The real question is whether the circumstances were sufficiently similar in each instance." 261 Or. at 360, 494 P.2d 412.

Rader is a pre-evidence code decision, and the Oregon Evidence Code does not itself touch on this relevancy issue. Plaintiff states that "[t]he 'similarity' issue * * * is no more than a question of relevance" and that the rule stated in *Rader* is the rule to be applied. I agree.

The "other accident" evidence in the exhibits is very general.[2] References are made to many different types of accidents and to machines manufactured by other companies. There is no evidence in this record concerning other accidents that provides any detail concerning the manner in which the accidents occurred. When this court has upheld the admission of evidence of other accidents, the record contained evidence of the manner in which those other accidents occurred. *See Rader v. Gibbons and Reed Co.*, *supra*, 261 Or. at 361, 494 P.2d 412 (testimony concerning rocks falling on earlier occasions on very highway where accident occurred held admissible because it "tends to prove that the movement of equipment on the haul road created a danger of accidents like that suffered by [plaintiff]"); *Clary v. Polk County*, 231 Or. 148, 152, 372 P.2d 524 (1962) (evidence showing prior accidents at the same place "is some evidence that the condition was dangerous"); *Saunders v. Williams & Co.*, 155 Or. 1, 7, 62 P.2d 260 (1936) (evidence that witness had slipped in oil on the floor of the defendant's store on two prior occasions held admissible to show a continuing defect or condition). This is necessary in order to determine whether the other accidents occurred under similar conditions and circumstances.

Unquestionably, the evidence received is replete with prejudicial information about ATVs. But aside from some general comments that there were a lot of ATV accidents involving tipping over backward, there was no specific evidence of even one accident that "must have occurred under

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[2] The information that CPSC obtained concerning other accidents was received from hospitals. All of the reports are "double hearsay" or "hearsay within hearsay" in the sense that some person told a care-giver about the accident, and the care-giver reported to CPSC. Unless otherwise stated, for purposes of this discussion, concerning "other accidents," I assume that the evidence is not subject to a valid hearsay objection.

similar conditions and circumstances." *Rader v. Gibbons and Reed Co., supra*, 261 Or. at 359, 494 P.2d 412. The documents received show that the reported accidents may have had a number of different causes, such as "loss of control" or hitting a bump, ditch, or other terrain feature.

In the decisions from other courts involving product claims where evidence of other accidents was offered, the courts have adhered to the requirement that the evidence of the other accidents be more specific, more detailed, than is the case here. The Tenth Circuit Court of Appeals recently considered the very issue here before us. *Kloepfer v. Honda Motor Co., Ltd.*, 898 F.2d 1452 (10th Cir. 1990), arose out of a rearward overturn accident of a three-wheeled Honda ATV on a steep hill and involved claims that the ATV was defective in its design and warnings. Unlike this case, however, the federal district court excluded evidence of the CPSC study of ATVs. The Tenth Circuit Court of Appeals affirmed, noting that "the proffered reports were not limited to three-wheeled vehicles, did not relate to an investigation into this accident or to the Honda model involved herein, but rather accidents, injuries and statistics involving all-terrain vehicles manufactured by over twenty manufacturers." *Id.* at 1458. The court also observed that there was "a real possibility that the jury would give undue deference to such evidence." *Ibid.*

Other courts have excluded CPSC-generated reports as inadmissible hearsay. For example, in *McKinnon v. Skil Corp.*, 638 F.2d 270, 278-80 (1st Cir. 1981), the court considered the admissibility of several CPSC reports concerning circular saw guards. Like this case, the plaintiff claimed that CPSC reports gave the defendant "notice" of prior accidents, established a defect, and undermined the credibility of one of defendant's witnesses. The First Circuit Court of Appeals noted that the proffered CPSC reports contained multiple levels of hearsay and held that they were properly excluded.

Similarly, in *Henkel v. R and S Bottling Co.*, 323 N.W.2d 185, 192-93 (Iowa 1981), the Iowa Supreme Court held that the trial court properly excluded evidence of a CPSC "hazard analysis" similar to plaintiff's Exhibit 28. The plaintiff contended that a CPSC report titled "Hazard Analysis of Carbonated Soft Drink Bottles" was admissible under the public records exception to the hearsay rule. The court concluded that the CPSC report lacked the indicia of trustworthiness necessary for admissibility and that the report would have misled the jury. *Accord*: *Prashker v. Beech Aircraft Corporation*, 258 F.2d 602, 608-09 (3d Cir. 1958) (trial court refused to admit 38 of 45 other accidents involving Bonanza aircraft. "To hold the aircraft responsible on such evidence would be utterly to disregard the factor of human fallibility known inevitably to occur in such circumstances and would be patently unjustified."); *Johnson v. Amerco, Inc.*, 87 Ill.App.3d 827, 42 Ill.Dec. 684, 409 N.E.2d 299, 315-16 (1980) (The plaintiff attempted to introduce reports of 1,000 prior accidents involving U-Haul trailers overturning. "The complexity of factors bearing upon the issue of whether a trailer is unreasonably dangerous under a certain set of conditions made it impossible to ascertain from the sketchy information provided in the reports which of the prior occurrences was sufficiently comparable to the Johnson accident. In addition, an examination of individual reports commonly reveals * * * either silence or dissimilarity concerning essential factors such as how the trailer was loaded, the size and nature of the tow vehicle, the type of hitch, as well as other factors.").

Exhibit 31 refers to other accidents and states:

> "After reviewing 169 cases, two main problems seen in the majority of ATV accidents seem to continue to be 1) instability – as documented in flipover, turnover, rollover on uphill or when hitting a rut, bumps, etc., and 2) difficulty of controlling the 3 wheel design – as seen in rollover when

attempting to turn quickly on a flat or hilly surface, and or a paved or gravel surface. These patterns have repeatedly occurred in accidents and deaths, whether alcohol, riding double or speeding were present or not, and for all ages of drivers. Also, although some victims were first time ATV users, half had ATV experience, and also were experienced with motorcycles or minibikes."

It was error to receive any part of Exhibit 31. The references to the accidents referred to therein contain no information concerning any specific accident. For the same reasons, the evidence of other accidents contained in Exhibits 20 and 21 should not have been received. Neither exhibit meets the relevance requirement that the other accidents be substantially similar.

The majority concludes:

"Second, defendants contend that the accidents that were referred to or described in the CPSC documents were not 'substantially similar' to the accident that caused plaintiff's injury here. Again, we disagree with defendants' contention. One of the excerpts at issue concerned reports of the instability of ATVs as a class. Another concerned reports showing a 'pattern of loss of control' specifically associated with ATVs manufactured by Honda. Three excerpts concerned reported incidents in which ATVs overturned backward, and three others more specifically concerned incidents in which ATVs overturned backward while climbing hills. As noted, the ninth excerpt concerned the similarity in configuration among all brands of ATVs. The trial court was entitled to find that the prior occurrences that were described in those excerpts were sufficiently similar to the accident at issue in this case to

make those occurrences relevant." 316 Or. at 268, 851 P.2d at 1087.

The CPSC documents provide *no* details concerning the prior accidents. The most that can be said is that some involve "rearward flips." That is not enough.

Beyond this, I maintain that the exhibits offered to establish that prior similar accidents had occurred are hearsay. The party offering evidence of other accidents has the burden of establishing that the other accidents "occurred under similar conditions and circumstances." *Rader v. Gibbons and Reed Co., supra*, 261 Or. at 359, 494 P.2d 412. The "other accidents" rule rests on the premise that the other accidents *happened*. The theory is that the *happening* of other accidents of which defendant is aware is admissible to prove notice to defendant. In truth, this evidence was offered to prove that the other accidents had *happened*. The jury, in weighing this evidence, would consider *how* the other accidents had occurred. How similar were the other accidents?

That brings me to the second category of evidence contained within these nine exhibits – opinions of various CPSC personnel concerning the design or safety of ATVs. Exhibit 28 is the most prejudicial. It is a memorandum from a person named Harvey Tzuker to Nick Marchica, neither of whom are otherwise identified in the record, either as to their job or responsibilities, their education or training, or as to their qualifications. The memorandum states:

"The front end of the vehicle is relatively light and acceleration on hills can cause the front wheel to lift, tipping the machine over backwards onto the operator. * * *

"* * * * *

"Conclusion, the more than tripling of projected nationwide ATV associated injuries, their relative

severity, the rate at which accidents are occurring and the ever widening knowledge of fatal incidents are all alarming and ominous.

"It is the opinion of this directorate, based on the data in our files, as well as information from other sources, that three-wheeled all-terrain vehicles may present one of the most significant and explosively growing product hazards ever considered by this agency."

Exhibit 23 is a similar document, a memorandum from Victoria R. Brown and Roy W. Deppa to Elizabeth Haught. As with Exhibit 28, the record is silent concerning their responsibilities or qualifications. The exhibit reads:

"Based upon our examination of the incidents and the machines, Engineering Sciences is of the opinion that the dynamic stability characteristics of the ATV comprise the single most prominent factor identifiable as a cause of loss of control."

There were extensive on-the-record discussions concerning documents such as these. Specifically concerning Exhibit 28, these discussions occurred:

"THE COURT: * * * This conclusion is rather potent language, and I'm sure the defendants are concerned about it. Now, we're talking about notice, and we're trying to say the plaintiffs argue that this comment is notice of the problems this plaintiff has alleged existed in their complaint. It doesn't relate to any plaintiff's allegation. It's a broad conclusion re type of observation about ATV-associated injuries.

"* * * * *

"THE COURT: It would be my view * * * that the probative value on notice, if any, of that comment, could only relate to your claim for punitive damages, because I would think that its only value it has, it doesn't give notice in the context of the court's analysis or rulings, but it may be a basis to argue to the jury, after receiving this notice, they continued to or did nothing, continued to put these things on the market, et cetera, et cetera.

"I'm having real difficulty with that conclusionary comment. You know, you never – I'm just kind of thinking out loud – you'd never under certain circumstances, for example, well I'm too strong, but I think it would be very difficult to get that kind of testimony from any kind of witness under any circumstances, and my letting it in through kind of a back door approach – and next level of consideration is, you know, this is – if there ever was anything inflammatory, this is it, but it may be relevant to punitives.

"* * * * *

"THE COURT: * * * You know, how do you – how does one really know that this writer is making that damning conclusion that emotional indictment, based on lack of stability, which is your whole theme?

"Now, I grant you, and I acknowledged earlier that you do have the paragraph which refers to stability, and that's why I'm just not outright saying no, I'm agonizing over that tenuous connection, and it is tenuous.

"[PLAINTIFF'S LAWYER]: I don't think I understood your concern until just now.

"THE COURT: All right.

"This writer, the man or woman who made this statement is making a harsh opinionated indictment. Just follow me step by step, and let [defense counsel] take care of his own problems.

"How does a person, a jury who's going to hear you read this, know that this person is referring to lack of stability as distinguished from possibly a defective gas tank?

"[PLAINTIFF'S LAWYER]: My first thought in response to that is the context of this document. The second thought is the context of all the documents, and all we know from all the documents about the nature of the investigation CPSC conducted.

"THE COURT: I just don't accept that argument. You just can't say: Judge, you have to look at all these documents. This document has to stand on its own four feet, or two feet, or how many feet it's got. My similes get twisted here after a while.

"[PLAINTIFF'S LAWYER]: May I refer the court back to the earlier portions of the documents which admittedly aren't highlighted or proposed for submission to the jury at this point, but this is a document which spends three pages talking about hospital data and evidence, epidemiological evidence of accidents involving ATVs, and then specifies some preliminary findings about the nature of those accidents, one of which we highlight, and then draws this conclusion. It's – I don't think there can be two interpretations to the general source of this conclusion. It is clearly related to the stability issue of ATVs. They refer to the rate at which accidents are occurring in this paragraph.

"THE COURT: Well, I'm going to waffle, at least until I tell you to the contrary, and I'm sorry if it disrupts your case, it's going to have to disrupt your case.

"At this stage of the trial, and I'm not indicating any concept in my mind, I'm simply saying I want to think and sleep on this last paragraph, so you can use the paragraph on three, but until I instruct you to the contrary, the language in the paragraph conclusion will not be brought to the jury's attention."

The trial judge later made this comment concerning the conclusions in Exhibit 28:

"About Plaintiff's 28, that one-page conclusion that I have under advisement, [plaintiff's lawyer], if you are telling me now, 'Judge, it's critical to our case that we include that ruling, that comment to the jury at this time,' I'm going to admit it. It's your lawsuit.

"I think sometimes you have to share – although I have the ultimate responsibility, I would feel more comfortable if we could defer disclosing that to the jury.

"I think it's that category of evidence which has to be labeled as a real close call. So you have – I'm not going to interfere with a trial lawyer's tactical decisions. If you think it's critical, you can do so. But I would much prefer this matter be looked at."

Plaintiff opted to include Exhibit 28, and it was received.

The majority concludes that this opinion evidence is not within the hearsay definition of OEC 801(3), because it was not offered "to prove the truth of the matter asserted." The evidence ostensibly was offered to show that defendants had

notice that the writers of the memoranda had expressed opinions such as (I quote from Exhibit 28) "three-wheeled all-terrain vehicles may present one of the most significant and explosively growing product hazards ever considered by this agency." The question is: Are opinions of persons contained in government records concerning the safety of a product admissible in evidence to establish that the manufacturer of a product is on notice of the dangerousness of the product? I would hold that such opinions, offered under the circumstances in this case, are not admissible.

I begin with an elementary but important proposition. All evidence must rest on a foundation. The most common foundation is the direct knowledge of the witness who is testifying, knowledge based on actual experience – "I saw the accident." An expert's basis for knowledge, whether expert testimony or other testimony, whether offered as direct evidence, as impeachment, or otherwise, must rest on a foundation of reliability.

The foundation of reliability for eyewitness testimony is, "I perceived it." "There is a rule, more ancient than the hearsay rule, * * * that a witness is qualified to testify to a fact susceptible of observation, only if it appears that he had a reasonable opportunity to observe the facts." 2 McCormick, Evidence 99, § 247 (1992). True, some evidence reposes on other foundations of reliability. Business records are a good example.

> "Unusual reliability is furnished by the fact that regularly kept records typically have a high degree of accuracy. The very regularity and continuity of the records are calculated to train the recordkeeper in habits of precision * * * .
>
> "The common law exception had four elements: (1) the entries must be original entries made in the routine of a business, (2) the entries must have been made upon the personal knowledge of the recorder or of someone reporting the information, (3) the entries must have been made at or near the time of the transaction recorded, and (4) the recorder and the informant must be shown to be unavailable. If these conditions were met, the business entry was admissible to prove the facts recited in it." 2 McCormick, *supra*, at 264-65, § 286 (footnote omitted).

The admissibility of government records similarly rests on a foundation of reliability. *See United States v. Meyer*, 113 F.2d 387 (7th Cir.) (a map was properly received into evidence because it was compiled from records of the U.S. Corps of Engineers, the witness was in charge of that office, and the men who furnished the information were working under the witness' control), *cert. den.* 311 U.S. 706, 61 S.Ct. 174, 85 L.Ed. 459 (1940).

These CPSC records ostensibly were not offered under OEC 801(3) to prove the truth of the matters asserted in the record. Plaintiff disclaims reliance on OEC 803(8). What, then, is the foundation for the receipt into evidence of the opinions contained in these records? There has to be some foundation for all evidence.

Even though the majority disclaims reliance on OEC 803(8), it is relevant to our inquiry for reasons that follow. OEC 803(8) provides:

> "The following are not excluded by OEC 802, even though the declarant is available as a witness:
>
> "* * * * *
>
> "(8) Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth:
>
> "(a) The activities of the office or agency:

"(b) Matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding however, in criminal cases matters observed by police officers and other law enforcement personnel; or

"(c) In civil actions and proceedings and against the government in criminal cases, factual findings, resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness."

Plaintiff claims, and the majority concludes, that OEC 803(8) does not apply because the records were not offered to establish the truth of the matter asserted.[3] But all of the documents *are* government records. I look to OEC 803(8) for its policy concerning limitations on the use of government records. The public policy of Oregon is clear concerning opinions in government records: Opinions of government employees contained in government records are not admissible.

The commentary to OEC 803(8) states in part:

"The Legislative Assembly intends that this paragraph not provide a sweeping exception for public records containing evaluations or opinions. 'Factual findings' is to be strictly construed to allow as evidence only those reports, otherwise in accord with the rule, which are based on firsthand observation by the public official making the report."

The commentary makes two things clear. One is that the factual findings must be "based on firsthand observation by the public official making the report." The second is that

[3] But as will be discussed below, there is another hearsay aspect of this evidence that the majority has not considered.

there is no "sweeping exception for public records containing evaluations or opinions."

The reasons for this conclusion of the drafters of the Oregon Evidence Code are these:

"The first danger posed by Rule 803(8)(C) is the use of a fact finding in a public report without an opportunity for the opponent to cross-examine the reporter to determine the basis for the finding. One justification for the use of such fact findings is that public officials are objective and sufficiently responsible to include fact findings in their reports only if based on reliable information. In our adversary system, however, this assertion should be tested. For example, it is reasonable to expect that jurors could more effectively assess the reliability of a fact finding if they knew the background, training, and experience of the fact finder. Such information is unlikely to appear in a public report and would certainly not be revealed to the extent that it could be through cross-examination. Juries are likely to benefit even more from knowing specifically how the public reporter arrived at the finding. Even if such an explanation appears in the report, without cross-examination the opponent would have little or no opportunity to demonstrate weaknesses in the fact finder's methodology or to suggest better procedures that could have been employed.

"An even greater problem arises when reports are admitted containing conclusions based in whole or in part upon the observation or information of third parties. Such information may not possess any guarantees of trustworthiness that customarily underlie the hearsay exceptions, yet still form the basis for a fact finding admitted under Rule 803(8)(C)." Grossman & Shapiro, *The Admission of*

Government Fact Findings Under Federal Rule of Evidence 803(8)(C): Limiting the Dangers of Unreliable Hearsay, 38 U Kan L Rev 767, 771-72 (1990) (footnotes omitted).

Those reasons are applicable, as well, to opinions in government records offered to prove notice. Cross-examination is no less important concerning evidence to prove notice.

The majority confidently states that "[d]efendants' hearsay objections were not well taken, because the excerpts from the CPSC documents were not offered to prove the truth of the matters asserted therein." 316 Or. at 269, 851 P.2d at 1087. There is a problem with this conclusion, because the documents that contain the opinions of CPSC personnel, like the documents concerning other accidents, have a hearsay aspect that renders them inadmissible.

Exhibit 28 is illustrative. The effect of admitting Exhibit 28 is to say: CPSC is an agency of the United States. Nick Marchica works for CPSC.[4] Nick Marchica has an opinion concerning ATVs. He wrote to another CPSC employee, "three-wheeled all-terrain vehicles may present one of the most significant and explosively growing product hazards ever considered by this agency." The jury was instructed that this statement was admissible only for the purpose of giving notice to the defendants "that the ATVs could overturn."

It may be true that Exhibit 28 was not offered to prove that "three-wheeled all-terrain vehicles present one of the most significant and explosively growing product hazards ever considered by this agency." But the document offered was the *opinion* of a CPSC employee, Nick Marchica, and it was *received* as the opinion of a CPSC employee having knowledge of ATVs, received with no opportunity for cross-examination concerning the basis for the opinion. No one could deny that this document, even as limited by the trial court's instructions, had immensely more weight than would an opinion from some unidentified third person. Why does it have more weight? Because it is an opinion of one having knowledge of ATVs, a CPSC employee. I concede that the document, as offered and received, had but one nonhearsay aspect – to prove that defendants were on notice that a person had told them that ATVs were dangerous. The document has several hearsay aspects: that Nick Marchica had knowledge on which to base his opinion, that Nick Marchica was a CPSC employee, and that this was Nick Marchica's opinion.

[4] Exhibit 20 refers to Mr. Marchica as "Program Manager for Product Safety."

In order for the jury to consider whether the CPSC documents did provide "notice" to defendants, the jury must evaluate the reliability of the statements in those documents. In determining reliability, the jury implicitly will consider two things: (1) Does the out-of-court declarant have knowledge about the subject; and (2) is the statement of the out-of-court declarant likely to be viewed by defendants as truthful? In considering this second step, the jury must necessarily inquire into the "truth of the matter asserted."

The opinion in Exhibit 28 was addressed to the very question that the jury was required to decide: Were defendants' ATVs unreasonably dangerous? The trial judge opined that "it would be very difficult to get that kind of testimony from any kind of witness under any circumstances * * *, this is – if there ever was anything inflammatory, this is it * * *."

Professor Wigmore states that cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth. * * * [C]ross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure." 5 Wigmore, Evidence in Trials at Common Law

32, § 1367 (1979). Jones states that "the real basis of weakness [of hearsay] lies in the fact that the absent person, whose assertion is offered to prove the facts he asserts, is not subject to the testing process of cross-examination to reveal weaknesses in his perception, his memory and his integrity." 2 Jones on Evidence 166, § 8:2 (1972). Mr. Tzuker was not available for cross-examination concerning his basis of knowledge, his employment, and his experience and training.

The public policy stated in the commentary to the Evidence Code is clear – opinions of government employees contained in government records are not admissible. It may be that an expert would be permitted to express an opinion such as is contained in this exhibit, if the expert were available for cross-examination. *See* OEC 704 (expert testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact). However, those opinions are patently untrustworthy and thus their relevance, even for the purpose of notice, is greatly reduced. I would hold that such records are not admissible for any purpose.

To the best of my knowledge, no court has upheld the admissibility of opinion evidence like that contained in Exhibits 28 and 23 when offered as part of a government record. OEC 602 provides:

> "Subject to the provisions of OEC 703, a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness."

The effect of admitting Exhibit 28 was to permit Nick Marchica to testify without being present, and with no opportunity to cross-examine.

My decision on the remaining five exhibits is:

Exhibit 25 is a memorandum from William Walton to the commission. It raises "questions about CPSC-investigated (IDI's) death and injury incidents." However, the memorandum provided no details of those incidents. Nor does it contain any admissible factual findings.

Exhibit 120 refers to previous ATV accidents, without providing any details regarding the circumstances under which those accidents occurred. As is the case with all the exhibits mentioned above, this is the very type of evidence to be excluded by the rule in *Rader*. Absent any showing of the circumstances surrounding the accidents referred to in these exhibits, evidence of those accidents is not relevant. Nor do these exhibits contain any admissible factual findings.

Exhibit 122 does not refer to any prior accidents. Because it was offered to prove defendants' knowledge that ATV's could overturn backwards, and was not offered to prove the truth of the matter asserted, it is admissible.[5]

Most of the exhibits set forth in the Appendix are not admissible for any purpose, either as evidence of relevant "other accidents" or otherwise.

On the punitive damages question, I disagree with the majority. I read the Supreme Court decision in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), to require three due process procedural protections:

> 1. At trial, the jury must have adequate guidance by instructions, so that its award is reasonable, and not a product of "unlimited jury discretion." 499

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[5] Portions of Exhibit 37 may be admissible. Exhibit 121 appears to refer to some other report ("The ARTECH report"). It should not have been received.

U.S. at ____. 111 S.Ct. at 1044. "As long as [the jury's] discretion is exercised within reasonable constraints, due process is satisfied." *Ibid.*

2. The state must establish post-trial procedures for trial court review of punitive damages awards to ensure "meaningful and adequate review by the trial court." *Ibid.*

3. The state must establish post-trial appellate review procedures. "This appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." Id. at 1045. It also ensures "that punitive damage awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages."

Ibid.

The majority appears to require no post-verdict review procedures.

I would reverse the trial court and the Court of Appeals. I therefore dissent.

APPENDIX

Plaintiff's lawyer read the following exhibit excerpts to the jury:

EXHIBIT 20

"United States Government
Memorandum

U.S. Consumer Product
Safety Commission
Washington, D.C. 20207
Date: 09 JUL 1984

"TO: The Commission

* * * * * *

"FROM: Nick Marchica, Program
Manager for Product Safety Commission,
Office of Program Management
"SUBJECT: All-Terrain Vehicles (ATVs)

"* * * * *

"Stability is of concern. The handling characteristics are peculiar to the ATV and are distinctly different compared to a two-wheeled vehicle. Considerable practice is required to master 'all-terrain' use. However, a beginner may readily ride the ATV on gentle terrain, due to the static stability of the tricycle configuration.

"* * * * *

"In reviewing 40 in-depth investigations of ATV accidents from January 1981 through March 1984, several hazard patterns were identified:"

> Flipover or Rollover – Thirty-four cases resulted from rollover or tipover of the vehicle. In 13 of the rollover cases the injuries were serious and included concussions, eye injuries and fractured shoulders. Contact with the handlebars during rollover contributed to several cases of fractured skull, face, or jaw.

"*Medical Opinion*

"The Medical Director's opinion is that there is a lack of comprehension of the complexity of the vehicle's actual performance characteristics and the consequent inherent dangers. This is due to two factors: the deceptive impression of stability given by a tricycle type vehicle with a wide tread and broad wheels, and the agility of the vehicle which is advertised frequently as showing the vehicle in flight, operating at high speeds and performing complex maneuvers."

EXHIBIT 23

"United States Government
Memorandums

> U.S. Consumer Product
> Safety Commission
> Washington, D.C. 20207
> Date: 11 FEB 1985

"TO: Elizabeth Haught, CACA

* * * * * *

"FROM: Victoria R. Brown, ESHF and
Roy W. Deppa, ESES

"SUBJECT: Assessment of the Specialty Vehicle Institute of America Proposed Rider Training Program for All Terrain Vehicles

"* * * * *

"* * * Based upon our examination of the incidents and the machines, Engineering Sciences is of the opinion that the dynamic stability characteristics of the ATV comprise the single most prominent factor identifiable as a cause of loss of control."

EXHIBIT 25

"United States Government
Memorandum

> U.S. Consumer Product
> Safety Commission
> Washington, D.C. 20207
> Date: 29 MAR 1985

"TO: The Commission

* * * * * *

"FROM: William W. Walton, AED, ES
"SUBJECT: Forwarding of ATV Meeting Log.

"* * * * *

"SUBJECT: Design and Development of the Honda ACT[*]

"* * * * *

"* Note that ATC (All Terrain Cycle) is the Honda trademark name of the device more generally referred to as the All Terrain Vehicle (ATV).

"* * * * *

"*Discussion of ATV Safety*

"The dialogue dealt at some length on safety consideration in the design of the ATC, with specific question raised as to the extent of those considerations encompassed in the development process. Specifically, we raised questions about CPSC-investigated (IDI's) death and injury incidents. The emerging awareness by the Engineering Sciences staff that a common pattern of loss of control due to the dynamic characteristics of the ATV was described."

EXHIBIT 28

"United States Government
Memorandum

U.S. Consumer Product
Safety Commission
Date: MAR 20 1985

"TO: Nick Marchica, EX-P

* * * * * *

"FROM: Harvey Tzuker, EPHA

"SUBJECT: Further Information on All Terrain Vehicles (ATVs)

"• The front end of the vehicle is relatively light and acceleration on hills can cause the front wheel to lift, tipping the machine over backwards onto the operator. * * *

"* * * * *

"Conclusion, the more than tripling of projected nationwide ATV associated injuries, their relative severity, the rate at which accidents are occurring and the ever widening knowledge of fatal incidents are all alarming and ominous.

"It is the opinion of this directorate, based on the data in our files, as well as information from other sources, that three-wheeled all-terrain vehicles may present one of the most significant and explosively growing product hazards ever considered by this agency."

EXHIBIT 31

"United States Government
Memorandum

U.S. Consumer Product
Safety Commission
Date: February 11, 1985

"TO: Nick Marchica, EX-P

* * * * * *

"FROM: George Rutherford, EPHA
Jean Kennedy, EPHA
"SUBJECT: Updated Injury Data on All Terrain Vehicles

"* * * * * *

"*DISCUSSION*

"After reviewing 169 cases, two main problems seen in the majority of ATV accidents seem to continue to be 1) instability - as documented in flipover, turnover, rollover on uphill or when hitting a rut, bumps, etc., and 2) difficulty of controlling the 3 wheel design - as seen in rollover when attempting to turn quickly on a flat or hilly surface, and or a paved or gravel surface. These patterns have repeatedly occurred in accidents and deaths, whether alcohol, riding double or speeding were present or not, and for all ages of drivers. Also, although some victims were first time ATV users, half had ATV experience, and also were experienced with motorcycles or minibikes."

EXHIBIT 37

"Federal Register/Vol. 50, No. 105/ Friday, May 31, 1985/Proposed Rules
"CONSUMER PRODUCT SAFETY COMMISSION

"* * * * *

"All-Terrain Vehicles; Advance Notice of Proposed Rulemaking; Request for Comments and Data

"Agency: Consumer Product Safety Commission

"Summary: Based on available data, the Commission has preliminarily determined that there may be an unreasonable risk of injury associated with the use of all-terrain vehicles (ATVs) which may be sufficiently severe to require regulatory action by the Commission. The commission is aware of at least 161 deaths associated with ATVs occurring between January 1982 and April 1985. Estimates on the number of hospital emergency room treated injuries associated with ATVs in 1984 was 68,956. This is almost two and one-half times the number of injuries in 1983 and more than seven times the number in 1982. An estimated 28,000 ATV related injuries were treated in hospital emergency rooms nationwide in the first four months of 1985. This is approximately 80 percent higher than the estimated injuries treated during the same time period in 1984. The Commission is primarily concerned about accidents which result from (1) loss of control of the vehicle; (2) the vehicle overturning, such as flipping over backward, tipping over forward, or rolling over sideways; and (3) the rider being thrown from the ATV after it hits bumps, ditches, and other terrain features. [Footnote omitted.]

"* * * * *

"* * * The Commission is concerned about whether the performance characteristics of three and four wheel ATVs, including their dynamic stability and handling, are reasonably safe. The Commission's technical staff has not determined the feasibility, practicality, appropriateness, or cost of performance or other modifications, which would ade-

quately reduce or eliminate the risk of injury associated with ATVs. However, based on available data, the Commission staff believes that the performance characteristics of ATVs, including their dynamic stability and handling, are a significant factor in ATV related accidents.

"* * * * *

"* * * Overturning and loss of control were documented in the majority of reported ATV deaths.

"D. Engineering Information

"The basic configuration of the ATV and its unique performance characteristics, including dynamic stability and handling, appear to play a major role in accidents involving ATVs. Many of the serious-injuries and deaths reported in the in-depth investigations resulted from loss of control of the ATV and were observed regardless of whether alcohol, riding double, or speeding were also observed. These incidents involved drivers of all ages. Also, although some victims were first time ATV users, many had previous experience riding ATVs, and experience riding motorcycles or minibikes."

EXHIBIT 120

"United States Government
Memorandum

U.S. Consumer Product
Safety Commission
Date: 5/1/84

"TO: Nick Marchica, Program Management

* * * * * *

"FROM: Albert F. Esch, M.D.
Medical Director
"SUBJECT: All Terrain Vehicles, (ATVs)

"* * * * *

"As indicated in the reports prepared by Epidemiology, The common mechanisms that appear to be associated with the severe injuries are the dislodgment of the operator from the vehicle while it is in motion, and/or the overturning of the vehicle with consequent entrapment and crushing injuries to the driver. * * *

"* * * [T]here appears to be common lack of understanding or comprehension of the complexity of the vehicle's actual performance characteristics; and its consequent inherent dangers. This could be due in part to the deceptive impression given by a comfortable appearing, tricycle type vehicle, with a wide tread and broad wheels which would seem to assure stability. Such confidence might be furthered by the erroneous image of the vehicle's implied agility * * *.

"* * * * *

"The nature of the risk therefore can be characterized as circumstances in which there is a deceptively dangerous vehicle, (possibly mistermed *All* Terrain within reasonable constraints of safe operation), requiring a high degree of skill and insight into its performance for proper control, utilized by

a cross section of ages. As with aircraft, these vehicles can be unforgiving of minor errors in judgement and consequent accidents usually result in major injuries."

EXHIBIT 121

"United States Government
Memorandum

U.S. Consumer Product
Safety Commission
Date: 3 MAY 1964

"TO: Elizabeth Haught, CACA

* * * * * *

"FROM: Roy Deppa, ESES
Medical Director

"SUBJECT:* * * Review of Information Relating to Mechanical Characteristics of All Terrain Vehicles (ATV's)

"* * * * *

"The ARTECH report reveals that the three-wheeled ATV's currently being marketed are very similar in configuration, and there is little variation either between brands or from year to year. * * *"

EXHIBIT 122

"U.S. Consumer Product Safety Commission

Washington, D.C. 20207

(202) 634-7710

"RECEIVED
APR 30 1985

"TO: ALL MEDIA (News Directors, Consumer Reporters, Action-Line Columnists, Editorial Page Editors)

"RE: *Rising Death & Injury Toll from All-Terrain Vehicles (ATVs)*

"* * * * *

"*CAUSES*. At this time, Commission staff identify two underlying problems in ATV-related *accidents*. These involve: (1) instability of the vehicle (causing flipovers, turnovers, and rollovers when an ATV is moving uphill or hits a rut or bump); * * *. Variables which appear to have contributed to incidents, or their severity, include: riding surface, speed, alcohol involvement, additional passenger, nighttime use, and lack of helmet.

"An in-depth review of hazard patterns involved specifically in ATV-related *fatalities* revealed three basic scenarios: * * * (2) tipover/flipover/rollover (vehicle flipped backwards ascending a hill, tipped over frontwards, descending a hill, or rolled over sideways while turning); * * *." (Emphasis in original.)

APPENDIX B

KARL L. OBERG, RESPONDENT, v. HONDA MOTOR CO., LTD.;

HONDA R & D CO., LTD; AND AMERICAN HONDA MOTOR CO., INC.,

APPELLANTS.

A8709-05897; CA A61587.

COURT OF APPEALS OF OREGON.

108 ORE. APP. 43; 814 P.2D 517.

Before WARREN, P.J., and RIGGS and EDMONDS, JJ.

EDMONDS, Judge.

Defendants[1] appeal a judgment in favor of plaintiff in this product liability case. They make multiple assignments of error. We affirm.

At trial, plaintiff offered evidence that he was injured while riding a three-wheeled 1985 model Honda ATC 350X all-terrain vehicle (ATV) that was manufactured and sold by defendants.[2] While his two brothers watched, he attempted

[1] Defendants are the parent company and manufacturer of Honda products, a subsidiary that designs and tests the products, and the United States distributor.

[2] As used in this opinion, the term "ATV" refers only to three-wheeled models.

to climb a steep embankment with the ATV. His brothers testified that one of them stood in the middle of a nearby road to serve as traffic lookout and that plaintiff was moving at "walking speed" when he went up the embankment. Although plaintiff was an experienced ATV operator, his first attempt to make it up the embankment was unsuccessful and he rolled back down. He tried again, leaning farther forward, and climbed until the front wheel reached the top of the embankment. At that point, the front wheel came off the ground and the ATV overturned backwards. It tumbled to the base of the embankment and came to rest on top of plaintiff. He sustained multiple facial fractures, lacerations to one of his eyes and damage to his inner ear. As a result, he underwent extensive reconstructive plastic surgery. At trial, he testified that he continued to experience double vision, headaches, reduced short-term memory and cognitive limitations.

Plaintiff alleged, *inter alia*, that defendants had failed to perform reasonable safety tests on the ATV and that they were negligent in selling it, when they knew or should have known that it was a defective product. The case was tried to a jury, which awarded damages.[3]

Defendants moved for judgment notwithstanding the verdict, ORCP 63, and, in the alternative, for a new trial. ORCP 64. While those motions were pending, defendants discovered two previously unknown eyewitnesses to plaintiff's accident. According to defendants, the witnesses, James Ball and his daughter, Jennifer, would testify that, while they were travelling in a truck on the road near the site of plaintiff's accident, they first saw him at least 50 to 100 yards in the

[3] The jury awarded $ 919,390.39 as compensatory damages and $ 5,000,000 as punitive damages. It allocated 20% of the fault to plaintiff and 80% to defendants. The court reduced the compensatory damage award by 20% and entered a judgment against defendants for $ 5,735,512.31.

distance, moving at "running" speed, that is, 10 to 20 miles per hour. They did not see plaintiff start up the embankment, nor the accident itself, because of foliage on both sides of the road. No one was standing in the road as a lookout; plaintiff was not leaning as far forward on the ATV as he contended at trial; and, after the accident, the ATV came to rest near, but not on top of, plaintiff.

Jennifer was seven years old at the time of the accident. She and James made their statements nearly four years after the accident. James later said in an affidavit that he had read plaintiff's trial testimony regarding the accident and could not disagree with any of it. Defendants filed a second motion for new trial on the basis of the new evidence. The trial court denied all of the motions.

Defendants first assign as error the trial court's allowing plaintiff to read into evidence excerpts from several internal staff memoranda and an Advanced Notice of Proposed Rulemaking of the Consumer Product Safety Commission (CPSC) regarding ATV's.[4] The memoranda were dated

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[4] CPSC is a federal agency that regulates that sale of consumer products in the United States. It monitors national injury trends through the National Electronic Injury Surveillance System (NEISS). NEISS gathers information from 65 hospital emergency rooms and projects national statistics of injuries associated with approximately 1000 different products.

In May, 1985, in response to increasing reports of ATV--related accidents, CPSC created a staff task force to explore regulatory options. Approximately one year later, the task force submitted its report to the Commission. It made no finding of defects nor any recommendation for a product recall, although it said that ATVs and snowmobiles are "equally hazardous in their respective environments and depending on how they are used." CPSC later sued the leading ATV manufacturers, which resulted in preliminary and final consent decrees. Under the decrees, the manufacturers did not admit any product defect, but agreed to

from early 1984 to October, 1985. Defendants received all of the CPSC documents before plaintiff's accident. The excerpts said that, between January, 1982, and April, 1985, there were as many as 100,000 reported ATV-associated injuries and over 150 ATV-associated deaths in the United States. According to CPSC staff, a large number of the ATV accidents involved rearward "flip-overs" that resulted in "entrapment and crushing injuries to the driver." Two of the excerpts reveal that the "flip-overs" likely were a result of the "relatively light" front end of the ATV's as well as the "deceptive impression of stability given by a tricycle-type vehicle[.]"

Defendants argue that the CPSC excerpts are inadmissible hearsay. Plaintiff argues that the excerpts are not hearsay, because they were not offered for the truth of the matter asserted, but only to show that defendants were on notice that its ATV's could overturn rearward. In reply, defendants assert that admission of the evidence for that purpose is a "ruse," because it permits the jury to hear what otherwise is inadmissible evidence.

Hearsay is "a statement, other than one made by a declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." OEC 801(3). In *Sheedy v. Stall*, 255 Or. 594, 597, 468 P.2d 529 (1970), the Supreme Court said:

> "Where the out-of-court statement has relevancy both as evidence that the statement was made and also as evidence of the fact asserted in the statement, the problem is more difficult. This does not render the statement inadmissible, but limits the use to which the statement can be put."

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expand their public education and safety programs to help alleviate the risks associated with their products.

Because plaintiff did not offer the CPSC excerpts to prove that his ATV was defective, they are not hearsay. They are admissible for the limited purpose of showing defendants' knowledge of the purportedly harmful characteristics of its product. *See Reiger v. Toby Enterprises*, 45 Or.App. 679, 682, 609 P.2d 402 (1980).

Defendants next argue that the CPSC excerpts are unfairly prejudicial, because they distort the subject and substance of the documents from which they were extracted. OEC 403 provides:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence."

No objection was made under OEC 403 expressly. Even if the objection was preserved, the court properly balanced the probative value of the evidence against its prejudicial effect. The evidence was probative regarding plaintiff's claim that defendants knew that their product was defective. Also, the trial court allowed defendants' expert witness to read additional portions of the CPSC documents into the record and add to them his interpretations and comments. Finally, the court twice instructed the jury that it was to consider the evidence only on the issue of notice.[5]

---

[5] The trial court instructed:

> "Jurors, I am now going to permit plaintiff's counsel to read to you excerpts from some documents of the federal agency [CPSC]. The documents that I will allow plaintiff's counsel to read to you are not admitted for the purpose of establishing the truth of the statements contained in those documents. That means that you should not assume that the statements in those documents are true.
>
> "These documents are admitted for the limited purpose of notice. Plaintiff has alleged that these documents gave defendants notice before the date of the [*sic*] Oberg's accident that the [ATV's] could overturn.
>
> "I will not suggest to you that these documents constitute adequate notice. The adequacy of notice is an issue for you to decide. The statements contained in these documents, the ones that will be read to you, may or may not be true. But we are not going to resolve their truth in this courtroom. In other words, they are coming in for the limited purpose on the basis that plaintiff has alleged that Honda had notice, and this is the evidence that's submitted to you and you will make that ultimate determination."

Under the circumstances, the trial court did not abuse its discretion by admitting the evidence.

After plaintiff read the CPSC excerpts into the record, the court instructed the jury:

> "Jurors, again I want to review with you the limitation that the Court has placed on this information. First, I want to remind you that you should not assume that these statements are true. The plaintiff claims that the excerpts that the lawyer just read to you gave Honda notice before plaintiff's accident that [ATV's] could overturn, and I'm not suggesting to you that the excerpts just read to you constituted adequate notice. That will be an issue that you will have to decide.
>
> "Now, jurors, before we move on with another aspect of trial, let's take a moment, give you the chance to ask me any questions if you don't understand my instruction. You are not to assume that those statements are true, but you can consider them for whatever weight you want to give them as to this question of notice."

Defendants next argue that the CPSC excerpts should not have been admitted, because they violate the "substantial similarity" rule by referring to dissimilar accidents. That argument fails. Although the excerpts may have contained some evidence of dissimilar accidents, defendants did not seek to excise those portions from what was read to the jury, but instead objected to them in their entirety. Because the objections did not inform the trial court with particularity as to what evidence was objectionable, the court did not abuse its discretion. *Stanfill v. TAT (U.S.A.) Corp.*, 76 Or.App. 332, 337, 709 P.2d 717 (1986), *rev. den.* 300 Or. 562, 715 P.2d 94 (1986); *Meislahn v. Demorest*, 48 Or.App. 631, 617 P.2d 322 (1980).

Defendants' second assignment of error challenges the jury's punitive damages award as unconstitutional and excessive. In particular, defendants assert that the punitive damages award violates their rights under Article I, section 16, of the Oregon Constitution[6] and the Fourteenth Amendment. We consider defendants' Oregon constitutional arguments first. *Cole v. Dept. of Rev.*, 294 Or. 188, 190, 655 P.2d 171 (1982).[7]

Article I, section 16, provides, in part:

[6] Defendants' briefs also refer to the Eighth Amendment and Article I, section 10, of the Oregon Constitution. We will not consider those references, because defendants do not argue that the Eighth Amendment is a basis for reversal and their assignment of error does not refer to section 10. ORAP 5.45(4). Their other constitutional arguments do not merit discussion.

[7] Plaintiff argues that this assignment of error should not be considered, because defendants did not challenge the constitutionality of ORS 30.925 in the trial court. Plaintiff's assertion that defendants did not make that challenge is incorrect.

> "Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportional to the offense."

Defendants argue that, under section 16, a $5 million punitive damages award is either an excessive fine or a disproportional penalty.[8] No Oregon case has decided this issue. Article I, section 16, of the Oregon Constitution was modeled after the same section of the Indiana Constitution. *See* Carey, The *Oregon Constitution* 28 (1926). The Indiana Supreme Court, in recognition of the similarities between Article I, section 16, of the Indiana constitution and the Eighth Amendment, has concluded that section 16 requires no more and no less than the Eighth Amendment. *Norris v. State*, 271 Ind. 568, 394 N.E.2d 144 (1979).[9] The United States Supreme Court

[8] In *Cooper v. Eugene Sch. Dist.*, 76 Or.App. 146, 154 n.8, 708 P.2d 1161, *rev'd on other grounds* 301 Or. 358, 723 P.2d 298 (1986), we said:

> "Appellate decisions have applied [Article I, section 16] only to criminal penalties. *See State v. Turner*, 296 Or. 451, 455-57, 676 P.2d 873 (1984). Although we normally decide state constitutional issues before reaching the federal constitution, we do not consider this to be an appropriate case for deciding whether Article I, section 16 also applies to civil sanctions."

[9] Article I, section 16, of the Indiana Constitution provides:

> "Excessive bail shall not be required. Excessive fines shall not be imposed. Cruel and unusual punishments shall not be inflicted. *All penalties shall be proportioned to the nature of the offense.*" (Emphasis supplied.)

The emphasized language was added during the 1850 constitutional convention. *See* Brown, *Journal of the Convention of the People of Indiana to Amend the Constitution* 66 (Indiana Historical Collections Reprint 1936). Before 1850, that section was virtually

has held that the Eighth Amendment does not apply in civil actions between private parties. *See Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989). We hold likewise regarding section 16.

Defendants argue that the award of punitive damages violates the Due Process Clause of the Fourteenth Amendment. In particular, they assert that ORS 30.925[10] gives the

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identical to the Eighth Amendment, which provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[10] ORS 30.925 provides:

> "(1) In a products liability civil action, punitive damages shall not be recoverable unless it is proven by clear and convincing evidence that the party against whom punitive damages is sought has shown wanton disregard for the health, safety and welfare or others.
>
> "(2) During the course of trial, evidence of the defendant's ability to pay shall not be admitted unless and until the party entitled to recover establishes a prima facie right to recover under subsection (1) of this section.
>
> "(3) Punitive damages, if any, shall be determined and awarded based upon the following criteria:
>
> "(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;
>
> "(b) The degree of the defendant's awareness of that likelihood;
>
> "(c) The profitability of the defendant's misconduct;
>
> "(d) The duration of the misconduct and any concealment of it;
>
> "(e) The attitude and conduct of the defendant upon discovery of the misconduct;

jury "standardless discretion to award punitive damages," because it "contains no requirement that the award be proportional to plaintiff's injury, no specific guidelines for fixing the amount of the award, and no maximum" and allows the jury to consider their net worth. They also assert that, because Oregon courts lack the power to review jury verdicts for excessiveness under Article VII (amended), section 3, of the Oregon Constitution, *see Van Lom v. Schneiderman*, 187 Or. 89, 99, 210 P.2d 461 (1949), the Oregon system is *per se* unconstitutional. They rely on *Pacific Mut. Life Ins. Co. v. Haslip*, ____ U.S. ____, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991).

In *Haslip*, a group of Alabama insureds brought an action against a life insurance company and one of its agents, alleging that the agent had committed fraud when he continued to accept their premium payments, even though their insurance policies had been canceled. The jury returned a verdict that included an award of over $800,000 punitive damages. The verdict was upheld by the trial court after a post-trial hearing and by the Alabama Supreme Court. The United States Supreme Court granted certiorari to determine whether the Due Process Clause rendered the punitive damages award "constitutionally impermissible." ____ U.S. at ____, 111 S.Ct. at 1043.

> "(f) The financial condition of the defendant; and
>
> "(g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, damages awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected."

At the onset, the Court held that the common law method for assessing punitive damages is not *per se* unconstitutional.[11] ____ U.S. at ____, 111 S.Ct. at 1043. However, it then said:

> "We need not, and indeed, we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. *We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.*" ____ U.S. at ____, 111 S.Ct. at 1043. (Emphasis supplied.)

In other words, "[a]s long as the [jury's] discretion is exercised within reasonable constraints, due process is satisfied." ____ U.S. at ____, 111 S.Ct. at 1044.

With that in mind, the Court first scrutinized the trial court's jury instructions, which provided in part that, if the jury was "reasonably satisfied from the evidence" that defendants had perpetrated a fraud on plaintiffs, they could award punitive damages to deter defendants and others from engaging in similar wrongdoing in the future. ____ U.S. at ____ n. 1, 111 S.Ct. at 1037 n. 1. The Court noted that, in accordance with Alabama law, any evidence of the insurance company's wealth had been excluded. It then said:

> "The [trial court's] instructions gave the jury significant discretion in its determination of punitive damages. But that discretion was not unlimited. It

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[11] "Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable." 111 S.Ct. at 1042.

> was confined to deterrence and retribution, the state policy concerns sought to be advanced." ____ U.S. at ____, 111 S.Ct. at 1044.

The Court also cited with approval those punitive damages award systems that impose a standard of "clear and convincing evidence" or "beyond a reasonable doubt." ____ U.S. at ____ n. 11, 111 S.Ct. at 1046 n. 11.

The Court next concluded that the post-trial procedures adequately ensured meaningful and adequate review because, among other reasons, the courts have the authority under Alabama law to reduce an excessive award. The Court said:

> "By its review of punitive awards, the Alabama Supreme Court provides an additional check on the jury's or trial court's discretion. It first undertakes a comparative analysis. It then applies the detailed substantive standards it has developed for evaluating punitive awards. In particular, it makes its review to ensure that the award does 'not exceed an amount that will accomplish society's goals of punishment and deterrence.' This appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its reception.
>
> "* * * * *
>
> "The application of these standards, we conclude, imposes a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages. The Alabama Supreme Court's post-verdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages. While punitive damages in Alabama may embrace such factors as the heinousness of the civil

wrong, its effect upon the victim, the likelihood of its recurrence, and the extent of defendant's wrongful gain, the fact finder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket.

"* * * The standards provide for a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter. They surely are as specific as those adopted legislatively in Ohio Rev. Code Ann. § 2307.80(B) (Supp.1989) and in Mont.Code Ann. § 27-1-221 (1989)." ____ U.S. at ____, 111 S.Ct. at 1046.[12] (Citations omitted.)

On the basis of *Haslip*, we hold that the jury's discretion was exercised within reasonable constraints. The court's restrictive instructions adequately guided the jury during its consideration of defendants' liability for punitive damages.[13]

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[12] The Ohio and Montana statutes are similar to Oregon's.

[13] The trial court instructed the jury in accord with ORS 30.925:

"If you have found that plaintiff is entitled to general damages, you must then consider whether to award punitive damages. Punitive damages may be awarded to the plaintiff in addition to general damages to punish wrongdoers and to discourage wanton misconduct.

"In order for plaintiff to recover punitive damages against the defendant, the plaintiff must prove by clear and convincing evidence that defendant has shown wanton disregard for the health, safety, and welfare of others.

"Clear and convincing evidence is evidence that enables you to find that the truth of the facts asserted is highly probable.

The jury was informed that its punitive damages award, if any, should be designed to "punish wrongdoers and to discourage wanton misconduct." Further, it was advised that it could award punitive damages only if plaintiff had proved by clear and convincing evidence that defendants had engaged in "a particular aggravated deliberate disregard of the rights of others." Last, it was instructed regarding five of the substantive factors outlined in ORS 30.925(3). Although one of the factors requires a consideration of defendants' financial situation, the jury cannot consider that factor unless it first determines that defendants are guilty of wanton misconduct. Evidence of defendants' financial situation bears only on the

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"Wanton disregard for the health, safety, and welfare of others is conduct amounting to a particular aggravated deliberate disregard of the rights of others.

"If you decide this issue against the defendant, you may award punitive damages, although you are not required to do so, because punitive damages are discretionary.

"In the exercise of that discretion you shall consider evidence, if any, of the following:

"First, the likelihood at the time of the sale that serious harm would arise from defendants' misconduct.

"Number two, the degree of the defendants' awareness of that likelihood.

"Number three, the duration of the misconduct.

"Number four, the attitude and conduct of the defendant upon notice of the alleged condition of the vehicle.

"Number five, the financial condition of the defendant.

"And the amount of punitive damages may not exceed the sum of $5 million."

issue of whether, in the jury's discretion, the amount of punitive damages will deter similar future conduct. In context, the instruction on consideration of defendants' financial condition told the jury to arrive at an amount that would act as a deterrent.

Next, we examine Oregon's post-trial review procedures in the light of *Haslip*. We recognize that, unlike the Alabama post-trial and appellate review procedures, Article VII (amended), section 3, of the Oregon Constitution[14] prohibits

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[14] Article VII (amended), section 3, provides:

> "In actions at law, where the value in controversy shall exceed $200, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict. Until otherwise provided by law, upon appeal of any case to the supreme court, either party may have attached to the bill of exceptions the whole testimony, the instructions of the court to the jury, and any other matter material to the decision of the appeal. If the supreme court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial; or if, in any respect, the judgment appealed from should be changed, and the supreme court shall be of opinion that it can determine what judgment should have been entered in the court below, it shall direct such judgment to be entered in the same manner and with like effect as decrees are now entered in equity cases on appeal to the supreme court. Provided, that nothing in this section shall be construed to authorize the supreme court to find the defendant in a criminal case guilty of an offense for which a greater penalty is provided than that of which the accused was convicted in the lower court."

trial and appellate courts from setting aside a verdict on the ground that it is excessive. *See Van Lom v. Schneiderman*, *supra*. However, the Oregon Constitution does allow appellate review of a punitive damages award to determine whether there is any evidence to support the verdict. *See*, *e.g.*, *Chamberlain v. Jim Fisher Motors, Inc.*, 282 Or. 229, 239, 578 P.2d 1225 (1978). Further, the factors considered by the jury under the Oregon scheme are similar to those considered by Alabama courts in their post-trial review and approved by the Court in *Pacific Mut. Life Ins. Co. v. Haslip*, *supra*, ____ U.S. at ___, ____, 111 S.Ct. at 1044, 1045.[15] The post-trial review evaluates the admission of evidence pertaining to punitive damages and the jury instructions given on that issue. The combined effect of the restrictions on jury discretion mandated by ORS 30.925 and appellate review ensures that the fact finder be guided by more than a defendant's financial condition and that there be a rational relationship between the amount of the award and what is necessary for deterrence. The award of punitive damages in this case does not violate due process.

The only question that remains regarding the punitive damages award is whether there is any evidence to support the verdict. We conclude that there is, and we will not disturb it. *See* Or Const, Art VII (amended), § 3; *Friendship Auto Sales v. Bank of Willamette Valley*, 300 Or. 522, 537, 716 P.2d 715 (1986).

Finally, defendants assign error to the trial court's denial of their motion for a new trial on the basis of the discovery of new eyewitnesses to plaintiff's accident. The trial court found that "there was no lack of diligence by defendants in

---

[15] In *Haslip*, Justice O'Connor dissented in part, because she thought that Alabama *juries*, and not the state's judiciary, should apply those factors.

____ U.S. at _____, 111 S.Ct. at 1065.

their efforts to locate witnesses before the trial." Nonetheless, it concluded that "the newly discovered evidence probably would not have changed the result." *See Newbern v. Exley Produce Express*, 208 Or. 622, 631, 303 P.2d 231 (1956). In the light of the length of time between the accident and the Balls' statements, Jennifer's age at the time of the accident, the distance from which they observed plaintiff cross the road, the fact that neither of them actually saw the accident and the fact that James said that he did not disagree with plaintiff's testimony, the court did not abuse its discretion.

Affirmed.

APPENDIX C

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

KARL L. OBERG,	)	
	)	Case No. A8709-05897
Plaintiff,	)	
	)	ORDER DENYING
vs.	)	DEFENDANTS' MOTIONS
	)	FOR JNOV; FOR NEW
HONDA MOTOR CO., LTD;	)	TRIAL; AND TO DISMISS
HONDA RESEARCH AND	)	(ORCP 21)
DEVELOPMENT CO., LTD;	)	
AND AMERICAN HONDA	)	
MOTOR CO., INC.,	)	
	)	
Defendants.	)	

Following entry of Judgment, defendants' filed a Motion for Judgment Notwithstanding the Verdict, a Motion for New Trial, and a Motion to Dismiss (pursuant to ORCP 21).

Oral argument was heard on June 27, 1989. In addition, the court reviewed the parties' memoranda of law, attached Affidavits, exhibits and supplemental points and authorities. The court being fully advised, it is now

ORDERED:

1. Defendants' Motion for Judgment Notwithstanding the Verdict is denied;

2. Defendants' Motion for New Trial is denied;

3. Defendants' Motion for New Trial based on newly discovered evidence is denied; and

4. Defendants' Motion to Dismiss Pursuant to ORCP 21 is denied.

DATED this 13th day of July, 1989.

/S/ ROBERT P. JONES
Robert P. Jones
Circuit Court Judge

Order submitted by:

GAYLORD, THOMAS & EYERMAN, P.C.

By: /S/ DAVID F. SUGERMAN
David F. Sugerman
O.S.B. #86298
of Attorneys for Plaintiff

APPENDIX D

SUPREME COURT OF THE UNITED STATES

NO. A-209

HONDA MOTOR CO., LTD., ET AL.,

Applicants,

v.

KARL L. OBERG

ORDER

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the enforcement of the judgment of the Supreme Court of Oregon, case No. S38436, issued May 20, 1993, be stayed pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

/S/ Sandra Day O'Connor

Associate Justice of the Supreme
Court of the United States

Dated this 16th day of September, 1993

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF OREGON

KARL L. OBERG Respondent/Respondent	)	
v.	)	Order Denying Reconsideration
	)	SC S38436
MOTOR CO LTD HONDA Appellant/Petitioner	)	CA A61587
HONDA RESEARCH & DEVELOPMENT CO Appellant/Petitioner	)	
AMERICAN HONDA MOTOR CO INC. Appellant/Petitioner	)	
MOTOR VEHICLE MANUFACTURERS Amicus Curiae	)	
PRODUCT ADVISORY COUNCIL Amicus Curiae	)	
U. S. CHAMBER OF COMMERCE Amicus Curiae	)	
NATIONAL ASSN OF MANUFACTURERS Amicus Curiae	)	
BUSINESS ROUNDTABLE Amicus Curiae	)	
CHEMICAL MANUFACTURERS ASSN Amicus Curiae	)	
SNAP-ON TOOLS CORPORATION Amicus Curiae	)	
TIM KASH Amicus Curiae	)	
RAY PARK Amicus Curiae	)	

OREGON ASSN DEFENSE COUNSEL Amicus Curiae	)
CONSUMER FEDERATION OF AMERICA Amicus Curiae	)
U S PUBLIC INTEREST RESEARCH Amicus Curiae	)
OR STATE PUBLIC INTEREST GROUP Amicus Curiae	)
PORTLAND HEAD INJURY SUPPORT Amicus Curiae	)
OREGON TRIAL LAWYERS ASSN Amicus Curiae	)
SOUTHERN POVERTY LAW CENTER Amicus Curiae	)

The court has considered the Petition for Reconsideration and orders that it be denied.

DATE: July 27, 1993

/S/ WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

APPENDIX F

RULE 29.1 LIST OF SUBSIDIARY COMPANIES

HONDA MOTOR CO., LTD. SUBSIDIARIES

Japan

Honda R&D Co., Ltd.
Honda Engineering Co., Ltd.
Yutaka Giken Co., Ltd.
Zaotec, Inc.
Seikigiken Kogyo Co., Ltd.
Asama Giken Co., Ltd.
Honda Buhin Service Co., Ltd.
Denshi Giken Co., Ltd.
Honda Foundry Co., Ltd.
Honda Lock Mfg., Co. Ltd.
Honda Finance Co., Ltd.
Honda Motor Parts Service Co., Ltd.
Honda International Sales Corporation
Honda Access Corp.
Honda Parts Sales Co., Ltd.
Suzuka Circuitland Co., Ltd.
Honda Trading Corporation
Honda Leasing Corporation
Honda Sogo Tatemono Co., Ltd.
Honda Clio Shin Tokyo Co., Ltd.
Honda Racing Corp.
Honda Sun Mfg., Co., Ltd.
Honda Parking Co., Ltd.
Kibounosato Honda Co., Ltd.

North America

American Honda Motor Co., Inc.
Honda North America, Inc.

Honda of America Mfg., Inc.
Indiana Precision Technology, Inc.
American Honda Finance Corporation
Honda International Trading Corp.
Honda R&D North America, Inc.
Honda Engineering North America, Inc.
Honda Canada, Inc.
Honda de Mexico, S.A. de C.V.

Europe

Honda Austria G.m.b.H.
Honda Europe, N.V.
Honda Belgium N.V.
Honda Motor Europe Limited
Honda of the U.K. Manufacturing Limited
Honda France S.A.
Honda Deutschland G.m.b.H.
Honda R&D Europe G.m.b.H.
Honda Netherlands B.V.
Honda International Finance B.V.
Honda Italia Industrieale S.p.A.
Honda Automobile Italia, S.p.A.
Montesa Honda S.A.
Honda (Suisse) S.A.

Brazil

Honda Motor do Brasil Ltda.

Australia

Honda Australia Pty. Ltd.

New Zealand

Honda New Zealand Limited

Asia

Prospect Engine Manufacturing
Asian Honda Motor Co., Ltd.
Thai Honda Manufacturing Co., Ltd.
Honda Engine Mfg. Philippines, Inc.

Venezuela

Honda Venezuela C.A.

United States of America

Honda North America, Inc.
American Honda Motor Co., Inc.
American Honda Finance Corp.
Honda Trading of America Corp.
Honda of America Mfg., Inc.
Honda R&D North America, Inc.
Honda Engineering North America, Inc.
Honda Power Equipment Mfg., Inc.
Honda Performance Development, Inc.
American Honda Education Corp.
Calhac
Benton Water Supply, Inc.
American Honda Foundation
KTH Parts Industries, Inc.
Bellemar Parts Industries
Findlex Corporation
New Sabina Industries
Greenville Technology Incorporated
Tomasco Mulciber
Sunbury Components Industries, Inc.
T.S. Trim
Jefferson Industries Corporation
Indiana Precision Technology, Inc.
Blanchester FCM, Inc.

Yotec
Technical Auto Parts
Jay Tech
Honda All Lock
Midwest Express
Honda Accessory
VSK

Canada

Honda Canada, Inc.
Honda of Canada Mfg., Inc. (Div. of CH)
Honda Canada Finance
F&P Mfg., Inc.
BPI Canada
Yachiyo of Ontario

Mexico

Honda de Mexico, S.A. de C.V.

DEC 20 1993
OFFICE OF THE CLERK

No. 93-644

In the Supreme Court of the United States
OCTOBER TERM, 1993

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD; AND AMERICAN HONDA MOTOR CO., INC., PETITIONERS

v.

KARL L. OBERG, RESPONDENT

On Petition For a Writ of Certiorari to the Supreme Court of Oregon

BRIEF IN OPPOSITION

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Counsel for Respondent
* *Counsel of Record*

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QUESTIONS PRESENTED

1. Whether petitioners' failure to raise, in either the trial court or the Oregon Court of Appeals, their claim that the compensatory damage award violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and the Supreme Court of Oregon's failure to pass upon the claim bars review of that claim in this Court?

2. Whether the punitive damage award violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution where the ratio of punitive damages to compensatory damages is approximately 5.4 to one and the award is approximately one-tenth of one percent of petitioners' net worth?

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-644

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD; AND AMERICAN HONDA MOTOR CO., INC., PETITIONERS

v.

KARL L. OBERG, RESPONDENT

On Petition For a Writ of Certiorari to the Supreme Court of Oregon

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Oregon (Pet. App. 1a - 71a) is reported at 316 Or 263, 851 P.2d 1084. The opinion of the Court of Appeals of Oregon (Pet. App. 72a - 88a) is reported at 108 Or App 43, 814 P.2d 517.

STATEMENT

This case concerns petitioners' attack on a jury verdict awarding respondent $735,512.31 in compensatory damages for petitioners' negligent design, manufacture and marketing of a three-wheel all-terrain vehicle (ATV). As a result of petitioners' negligence, the 325 pound machine abruptly flipped backwards onto respondent and crushed his skull when he attempted to ride it up a hill as illustrated in petitioners' literature. Although petitioners never did the simple pre-manufacturing tests that would have revealed this propensity, they had ample notice of it from both private and public sources and made no effort to adequately warn users. The jury found that petitioners' conduct demonstrated a "wanton disregard for the health, safety and welfare of others" and awarded respondent $5,000,000 in punitive damages.

Petitioners did not assert that the jury's compensatory damage award violated their rights under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution until they sought discretionary review in the Supreme Court of Oregon. That court did not pass upon petitioners' belated due process challenge to the compensatory damage award. It did, however, reject petitioners' due process challenge to the punitive damage award in a thorough and thoughtful opinion. It found that, taken as a whole, the elaborate procedural safeguards established by Oregon's legislature for awarding punitive damages in product liability actions resulted in a punitive damage verdict that is valid in all respects under the Due Process Clause.

Respondent was injured while riding a three-wheel 1985 model Honda ATC 350X ATV manufactured and sold by petitioners. While his brothers watched, he attempted to climb a short steep embankment with the

ATV at "walking speed." Although respondent was an experienced ATV operator, his first attempt was unsuccessful and he rolled back down. He tried again, leaning further forward, and climbed until the front wheel reached the top of the embankment. Suddenly, the 325 pound vehicle flipped over backwards landing on respondent. Respondent suffered serious injuries including multiple interconnected facial fractures which required that his eye sockets, cheek bones, jaw bones and teeth be wired together; damage to his inner-ear mechanism affecting his balance and cognitive functions; damage to his eye sockets causing double vision; damage to his sinuses and deep skeletal structures causing severe headaches, brain damage resulting in impairment of mental powers including short term memory loss and lowered self-esteem. These injuries (including his altered appearance) are permanent and will limit respondent's employment opportunities.

The 350X ATV -- dubbed the "King of the Hill" in petitioners' advertising -- was one of the highest performance three-wheel models made. Its short wheel base, high traction rear wheels, high torque engine and high center of gravity made it highly unstable. Variations in acceleration, slope or the rider's lean could cause it to instantly flip over onto the rider. Despite the fact that simple engineering tests would have shown that this ATV is prone to such flips on slopes encountered in the ordinary off-road usage for which it is marketed, it had no roll over protection of any kind. Nor did petitioners ever publish any warnings adequately disclosing the ATV's proclivity to flip backwards. In fact, petitioners never performed the simple tests that would have revealed the maximum slope on which this ATV could be safely operated and the rider's narrow to nonexistent margin of error on such slopes. Petitioners also never calculated,

tested or made any design modifications to reduce the likelihood that this ATV would flip over and land on top of the rider -- even after petitioners learned from both private and public sources of similar accidents prior to beginning production of this model.

Despite petitioners' failure to perform adequate testing, internal memoranda and the testimony of former employees revealed that petitioners were fully aware of the stability problems with its three-wheel ATVs. For example, in 1976 Peter Cash, a District Sales Manager for petitioners, submitted a written proposal to American Honda's National Manager of Safety calling for specialized rider training due to the special stability problems of three-wheel ATVs, including their tendency to flip over backwards. Petitioners ignored it. In 1977, American Honda Motor Co. circulated widely in house a written survey of its service representatives that noted the unusual instability of three-wheel ATVs and their tendency to flip over backwards. In addition, when the Consumer Product Safety Commission (a federal agency established to protect consumers from dangerous products) learned of a 23-fold increase in injuries associated with ATVs between 1979 and 1984, it published its data and opened up an investigation. This led to public hearings, private meetings with petitioners, CPSC engineering tests and the publication of numerous documents showing the special instability of three-wheel ATVs.[1]

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[1]In 1988 all ATV distributors, including petitioners, entered into final consent decrees with the CPSC and the U.S. Department of Justice in which the distributors agreed to halt distribution of three-wheel ATV's. 56 Fed. Reg. 47166-47167, September 18, 1991. In 1991, the CPSC terminated its investigation of other types of ATV's without disturbing the

Despite petitioners' knowledge of the tendency of its three-wheeled ATV to flip over backwards and the acute danger this posed to riders, they made no effort to adequately warn users. In fact, petitioners continued to misrepresent that riders could learn by trial and error to identify hills that could and could not be safely climbed. Meanwhile, sales of petitioners' three-wheeled ATVs "went through the roof."

The jury awarded $919,390.39 as compensatory damages. It allocated 20% of the fault to respondent and 80% to petitioners. The jury also awarded $5,000,000 as punitive damages. The trial court reduced the compensatory damage award by 20% and entered judgment against petitioners for $5,735,512.31. Although in their post-trial motions petitioners asserted that the compensatory damage award was excessive they did not assert that it violated the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, seeking instead to set aside the verdict on State law grounds only. Petitioners did argue, however, that the punitive damage award violated the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. After a hearing, the trial judge denied these motions without opinion.

In the Oregon Court of Appeals, petitioners again did not contend that the compensatory damages verdict violated their due process rights arguing only State law grounds in support of reversal. Petitioners, however, again asserted that the punitive damage award violated their due process rights. The Court of Appeals unanimously affirmed in a 19 page opinion that thoroughly analyzed and rejected petitioners' due process

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consent decrees. 56 Fed. Reg. 47166-47167, September 18, 1991.

challenge to the punitive damage award. It did not pass upon petitioners' State law challenge to the compensatory damage award.

In the Supreme Court of the State of Oregon, petitioners for the first time asserted that *both* the compensatory and punitive damage awards violated their due process rights under the Fourteenth Amendment to the U.S. Constitution. Oregon's Supreme Court thoroughly analyzed and rejected petitioners' due process challenge to the punitive damage award but did not pass upon petitioners' belated due process challenge to the compensatory damage award.

The Oregon Supreme Court began by thoroughly analyzing this Court's opinion in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct 1032 (1991) noting this Court's statement that:

> "One must concede that unlimited jury discretion -- or unlimited judicial discretion for that matter -- in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. *We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.* We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus." [Emphasis added]

Oberg v. Honda, 316 Or. 263, 277, 851 P2d. 1084, 1092. It read this Court's opinion in *Haslip* as identifying

> "the constitutional interests required to be safeguarded in the determination of an award of punitive damages: the constitutional interest in ensuring that the finder of fact has 'adequate guidance' in making such an award and the constitutional interest in ensuring that the amount of the resulting award is 'reasonable.'"

Oberg, supra at 316 Or 280, 851 P2d 1094.

The Oregon court then reviewed the elaborate procedural safeguards required by the Oregon legislature in products liability actions where punitive damages are sought, noting that ORS 30.925 provides:

> 1. That in a products liability civil action punitive damages are not recoverable unless it is "proven by clear and convincing evidence" that the defendant "has shown wanton disregard for the health, safety and welfare of others";
>
> 2. That at trial "evidence of the defendant's ability to pay shall not be admitted unless and until" plaintiff "establishes a prima facie right to recover punitive damages" and that punitive damages shall be determined based upon the following criteria:
>
> a. "The likelihood at the time that serious harm would arise from the defendant's misconduct;
>
> b. The degree of the defendant's awareness of that likelihood;
>
> c. The profitability of the defendant's misconduct;
>
> d. The duration of the misconduct and any concealment of it;

e. The attitude and conduct of the defendant upon discovery of the misconduct;

f. The financial condition of the defendant; and

g. The total deterrent effect of other punishment imposed on the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected."

Oberg, supra at 316 Or 281, 851 P2d 1094.

The Oregon court held that these safeguards ensure that sufficiently definite and meaningful constraints are imposed on the jury which, in turn, ensures that an award of punitive damages bears a rational relationship to a defendant's conduct and to the need for punishment and deterrence. *Oberg, supra* at 316 Or. 283, 851 P2d 1096. It concluded its review of the procedures employed in this case by comparing the resulting award with the award this Court upheld in *Haslip* and decided that in significant respects they were similar:

> "In *Haslip*, the Court stated that the award of punitive damages, which was upheld, was more than 4 times the amount of compensatory damages and more than 200 times the amount of out-of-pocket expenses of the plaintiff. 111 S Ct at 1046. The proportions here are similar. The award of punitive damages here is about 5.4 times the amount of compensatory damages and about 258 times the amount of out-of-pocket expenses of plaintiff."

Oberg, supra at 316 Or 286n.14, 851 P2d 1097n.14.

Finally, the court rejected petitioners' assertion that due process in all cases requires a broader scope of post-verdict judicial review than is available under Oregon's Constitution. It correctly noted that *Haslip* did not hold that an award of punitive damages must always be subject to a form of judicial review that includes the possibility of remittitur. *Oberg, supra* at 316 Or 284, 851 P2d 1096. Instead, it viewed *Haslip* as concluding that "Alabama procedure, as a whole and in its net effect, did not violate the Due Process Clause." *Id.* at 316 Or 284, 851 P2d 1096. It noted that the criteria employed by the reviewing State courts in *Haslip* (and approved in that opinion) were, in this case, applied by the jury itself *increasing* their protective effect. See *Haslip, supra* 111 S Ct at 1060-61 (O'Conner, J. dissenting) ("Alabama system violates due process, because that system vests standardless discretion *in the jury* to fix a penalty and provides for application of standards only on review of jury award; *jury* should be instructed in, and apply, Alabama criteria"). *Oberg, supra* at 316 Or 284-285; 851 P2d 1096. It concluded that in light of the elaborate safeguards utilized to circumscribe and guide the jury's exercise of its discretion in this case, the constitutionally prescribed measure of judicial review in Oregon (ensuring that the jury was properly instructed and that there was evidence to support an award of punitive damages) was adequate under the Due Process Clause. *Id.*

ARGUMENT

The decision of the Supreme Court of the State of Oregon is correct and does not conflict with any decision of this Court or any other State supreme court or any

court of appeals. Petitioners' belated claim that the compensatory damage award violated the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution was not properly raised in the Oregon courts, was not passed upon below and is not subject to review here. Petitioners' due process challenge to the punitive damage award is largely of academic interest since they do not claim and cannot claim, in light of this Court's decisions in *Haslip* and *TXO Production Corp., v. Alliance Resources*, 113 S.Ct. 2711, that the award itself is constitutionally excessive. The Oregon Supreme Court carefully considered petitioners' procedural arguments in support of their due process challenge to the punitive damage award and rejected them in a thorough and thoughtful opinion. In these circumstances, further review is unwarranted.

Petitioners' failure to properly raise their claim that the compensatory damage award violated their rights under the Due Process Clause of the Fourteenth Amendment is fatal to their efforts to secure review of that issue in this Court. As petitioners themselves admit, the Oregon Supreme Court did not expressly pass upon the issue. Pet. at 5. In these circumstances it is well settled that "it will be assumed that the omission was due to want of proper presentation in the State courts, unless the aggrieved party in this Court can affirmatively show the contrary." *E.g. Exxon Corp. v. Eagerton*, 462 U.S. 176, 181n.3 (1983). Petitioners, however, have made no attempt to make either this showing or the showing required by Supreme Court Rule 14(h).

Nor could they. As a general rule the Oregon Supreme Court will not consider issues, including constitutional issues, unless they were first raised and preserved in the trial court. *Christensen v. Murphy*, 296 Or 610, 612, 678 P2d 1210, 1213 (1984); *Ensley-Koebel v.*

National Guaranty Properties, Inc., 279 Or 391, 395-96, 568 P2d 655, 657 (1977); *Travelers Indem. Co. v. American Ins. Co.*, 278 Or 193, 199, 563 P2d 684, 687 (1977); *Waller v. Rocky Mountain Fire & Cas. Co.* 272 Or 69, 81, 535 P2d 530, 536, (1975); *Smith Kline & French Laboratories v. State Tax Commission*, 241 Or 50, 57n.1, 403 P2d 375, 378n.1 (1965); *State By and Through State Highway Commission v. Helliwell*, 225 Or 588, 590-91, 358 P2d 719, 721 (1961). The same is true in the Oregon Court of Appeals. *Junck v. Wright*, 94 Or.App. 704, 708, 767 P2d 100, 102, *review denied* 308 Or 465, 781 P2d 1214 (1989); *Nelson v. Lane County*, 79 Or.App.753, 757-58, 720 P2d 1291, 1294, *affirmed* 304 Or 97, 743 P2d 692 (1986); *State ex rel. Swann v. Pearce*, 69 Or.App. 475, 476, 686 P2d 484, 454-55, *review denied* 298 Or 150, 690 P2d 506 (1984).

As shown above, petitioners raised their claim that the compensatory damage award violated their rights under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution for the first time in the Oregon Supreme Court. It was not properly raised there and was not passed upon by that court. This is fatal to petitioners' effort to secure further review in this Court. *TXO Production Corp., v. Alliance Resources*, 113 S.Ct. 2711, 2723 (1993); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276-277 (1989); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 76-80 (1988). In any event, the award was reasonable given the severity of the injuries.

There is and can be no serious claim that the punitive damage award here is constitutionally excessive under the Due Process Clause. When the Oregon Supreme Court compared the award in this case against the *Haslip* award (the then only award upheld by this Court against a claim that it was constitutionally excessive under the Due Process Clause) it concluded that the

awards were similar. Its implicit conclusion that the award here, like the *Haslip* award, is not constitutionally excessive under the Due Process Clause appears even more reasonable in light of the *TXO* decision. There, this Court upheld a $10,000,000 punitive damage award where there was only $19,000 in compensatory damages. As the *TXO* plurality concluded, even if the "actual value of the 'potential harm' to respondents" were measured at $1,000,000, the "disparity between the punitive award and the potential harm does not, in our view, "jar one's constitutional sensibilities."" *TXO supra* at 113 S.Ct. 2722. In *Browning-Ferris Industries v. Kelco Disposal*, 492 U.S. 257, 262, 279 and 282 (1989), this Court upheld, under the more restrictive standard of discretionary remittitur, a $6,000,000 punitive damage verdict 117 times as large as the compensatory damages verdict.

Thus, whether one looks at *TXO's* 526 to one ratio of punitive to actual damages or its 10 to one ratio of punitive to "potential" damages or *Browning-Ferris'* 117 to one ratio of punitive to compensatory damages, the 5.4 to one ratio of punitive to compensatory damages awarded here is quite conservative and certainly does not "jar one's constitutional sensibilities." Viewing the *TXO* award and the award here from the perspective of their impact on the respective defendants points to the same conclusion. *TXO's* net worth at the time of the award was approximately $2.5 billion while Honda's was approximately $5 billion. *TXO, supra*, 113 S. Ct. 2716n.9. Thus, as a percentage of net worth, the *TXO* award was four times as large as the award here. As Justice Scalia said in his concurring opinion in *TXO*, this due process challenge to the punitive damage award can be disposed of with the simple observation that "this is no worse than *TXO*." 113 S.Ct. at 2727.

In light of these decisions petitioners have not even

tried to argue that the award is constitutionally excessive under the Due Process Clause. The only reason suggested by petitioners for reviewing such an award is the plainly improper reason of seeking to change State law in the hope that Oregon courts will develop common law excessiveness standards more favorable to petitioners than is required by the Due Process Clause. Pet.11-12. *Browning-Ferris Industries, supra* at 492 U.S. 279. In any event, petitioners' procedural arguments are unfounded.

To begin with, as the Oregon Court correctly concluded, this Court's decisions in *Haslip* and *TXO* do not require that any particular form of procedure be employed in punitive damage actions as long as, on balance, they do not violate due process. In this case, it is undeniable that the procedures employed to guide and direct the jury's exercise of discretion far exceed those in *Haslip* and *TXO*. They included use of a "clear and convincing" evidentiary standard, withholding of evidence of ability to pay until a *prima facie* case for punitive damages had been made and seven legislatively determined objective criteria to be considered by the jury in awarding punitive damages.[2] Compared to the trial procedures in *Haslip* and *TXO*, petitioners do not and cannot claim that these far more rigorous procedures resulted in an unfair trial.

Moreover, as the Oregon Supreme Court correctly noted, there was meaningful post-trial judicial review of both the law and the evidence and the court undertook a comparative review of this award against this Court's existing precedent. Due process requires no more, even

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[2]No instruction was given concerning the "total deterrent effect of other punishment" because petitioners had not been subjected to any such "other punishment."

in capital cases. *Pulley v. Harris*, 465 U.S. 37 (1984); *Lewis v. Jeffers*, 497 U.S. 764 (1990), *Walton v. Arizona*, 497 U.S. 639 (1990); *State v. Wagner*, 305 Or 115, 169, 178, 752 P2d 1136, 1170, 1176 (1988), *certiorari granted*, 492 U.S. 914 (1989) (judgment vacated and remanded for reconsideration in light of *Penry v. Lynaugh*, 492 U.S. 302 (1989)), affirmed in relevant part, 309 Or 5, 16, 786 P.d 93, *certiorari denied*, 498 U.S. 897 (1990); *State v. Montez*, 309 Or 564, 607, 789 P2d 1352, 1379-80 (1990). Furthermore, as petitioners implicitly concede, this Court has never held that due process requires State judges to have the power on appeal to set aside jury verdicts awarding damages arrived at in trials that are free from error solely on the ground that the reviewing court disagrees with the jury's decision as to the amount of damages. In fact, from the founding of the Republic, the law has been exactly the opposite in both civil and criminal cases:

> *"There is no constitutional requirement that a State provide for an appeal at all. "It is wholly within the discretion of the State to allow or not to allow such review." If a State decides to confer a right of appeal, it is free to do so "upon such terms as in its wisdom may be deemed proper."* This decision was not a constitutional aberration. There was no right of appeal from federal convictions until 1889 when Congress granted a right of direct review in the Supreme Court in capital cases. In 1891 Congress extended this right to include "otherwise infamous crimes." Similarly, there was no right of appeal from criminal convictions in England until 1907. In both countries, the concept of due process in criminal proceedings is addressed almost entirely to the fairness of the trial." [Emphasis added, citations omitted.]

Evitts v. Lucey, 469 U.S. 387, 393, 409-410 (1985) (Rehnquist, J., dissenting.)

This rule, which flows inexorably from Congress's constitutional power under Article III, Section 2 to make "exceptions" to and otherwise "regulat[e]" this Court's jurisdiction,[3] *(Ex Parte McCardle*, 74 U.S. (7 Wall) 506, 514 (1869)) has become one of the most frequently invoked doctrines in this Court's jurisprudence. *McKane v. Durston*, 153 U.S. 684, 687 (1894); *Andrews v. Swartz*, 156 U.S. 272, 275 (1895); *Reetz v. Michigan*, 188 U.S. 505, 508 (1903); *Rogers v. Peck*, 199 U.S. 425, 435 (1905); *Standard Oil Co. v. Missouri*, 224 U.S. 270, 286-87 (1912); *Ohio v. Akron Park District*, 281 U.S. 74, 80 (1930); *Dist. Of Columbia v. Clawans*, 300 U.S. 617, 627 (1937); *Carter v. Illinois*, 329 U.S. 173, 175 (1946); *Brown v. Allen*, 344 U.S. 443, 486n.36 (1946); *National Union v. Arnold*, 348 U.S. 37, 43 (1954); *Griffin v. Illinois*, 351 U.S. 12, 18, 21, 27 (1956); *Douglas v. California*, 372 U.S. 353, 365 (1963); *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Ortwein v. Schwab*, 410 U.S. 656, 660, 665 (1973); *Ross v. Moffitt*, 417 U.S. 600, 606, 610-11 (1974); *Estelle v. Dorrough*, 420 U.S. 534, 536-37 (1975); *Woodson v. North Carolina*, 428 U.S. 280, 316 (1976); *Abney v. United States*, 431 U.S. 651, 656 (1977); *Jones v. Barnes*, 463 U.S. 745, 751, 756 (1983); *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 31 (1987); *Pennsylvania v. Finley*, 481 U.S. 551, 555-558 (1987); *Murray v. Giarratano*, 492 U.S. 1, 18 (1989); *Whitmore v. Arkansas* 495 U.S. 149, 167 (1990).

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[3]"[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Similarly, no claim can be made that due process requires that State trial judges have the power to set aside jury verdicts arrived at after a fair trial. As this Court said in *Standard Oil Co. v. Missouri*, 224 U.S. 270, 286-87 (1912):

> "[T]he power to render a final judgment must be lodged somewhere, and in every case a point is reached where litigation must cease. *What that point is can be determined by the legislative power of the State for right of appeal is not essential to due process of law.*" [Emphasis added.]

The Court has applied this doctrine to uphold against due process attack the State's power, by constitution, to make a jury's verdict final and unreviewable on similar fact dependent issues:

> "It may be assumed...that, if the question were open to a ruling of law, it would be ruled that plaintiff could not recover. But the Oklahoma Constitution provides that "the defense of contributory negligence...shall, at all times, be left to the jury"....*There is nothing, however, in the Constitution of the United States or its Amendments that requires a State to maintain the line with which we are familiar between the functions of the jury and those of the Court*...As it may confer legislative and judicial powers upon a commission not known to the common law it may confer larger powers upon a jury than those that generally prevail." [Citations omitted, emphasis added.]

Chicago, R.I. & Pac. Ry. Co. v. Cole, 251 U.S. 54, 55-56 (1919); accord *Pittsburgh &c. Railway Co. v. Backus*, 154

U.S. 421, 426-27 (1894) ("Rehearings, new trials, are not essential to due process of law, either in judicial or administrative proceedings...If a single hearing is not due process, doubling it will not make it so....")

More recently this concept has been upheld in decisions of this Court reviewing State capital punishment systems attacked on due process grounds. In *Gregg v. Georgia*, 428 U.S. 153, 166 (1976), for example, this Court upheld a capital sentencing scheme even though "[i]n jury cases, the trial judge is bound by the jury's recommended sentence." This Court also upheld capital sentencing systems in Texas, California, Pennsylvania and Oregon that preclude the trial judge from substituting his judgment for the jury's decision to impose the death penalty. *Jurek v. Texas*, 428 U.S. 262, 269 (1976); *Blystone v. Pennsylvania*, 494 U.S. 299, 302 (1990); *Boyde v. California*, 494 U.S. 370, 374 (1990); *State v. Wagner*, 305 Or 115, 169, 178, 752 P2d 1136, 1170, 1176 (1988), *certiorari granted*, 492 U.S. 914 (1989) (judgment vacated and remanded for reconsideration in light of *Penry v. Lynaugh*, 492 U.S. 302 (1989)), affirmed in relevant part on reconsideration, 309 Or 5, 16, 786 P2d 93, *certiorari denied*, 498 U.S. 897 (1990); *State v. Montez*, 309 Or 564, 607, 789 P2d 1352, 1379-80 (1990).

In sum, the jury's award in this case is plainly not constitutionally excessive in comparison with the awards upheld in *Haslip* and *TXO* and the post-verdict review was more than adequate since due process requires none at all. In any event, petitioners' award received comparative review in the Oregon Supreme Court, a level of judicial review not even required in capital cases. Petitioner has shown no sufficient reason why further review is needed to reconsider settled procedures long found sufficient under the Due Process Clause even in capital cases and no reason why such procedures here are not sufficient to

award mere money damages. It is time to lay this matter to rest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD.; AND AMERICAN HONDA MOTOR CO., INC., PETITIONERS

v.

KARL L. OBERG, RESPONDENT

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

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REPLY BRIEF FOR THE PETITIONERS

In our petition we pointed out that post-verdict review of damages awards has been an established part of American judicial procedures since the adoption of the Constitution, that Oregon is the only state in the Union that denies such review, that this Court in *Haslip* and *TXO* indicated that some form of judicial excessiveness review is required by the Due Process Clause, and that several state courts expressly have so recognized. Remarkably, Oberg ignores the impressive historical pedigree of post-verdict excessiveness review; he ignores that Oregon stands alone in denying such review; he ignores *TXO* entirely, while making only minimal reference

to *Haslip*; and he ignores the many state-court decisions interpreting *Haslip* and *TXO* to require post-verdict excessiveness review.[1] Instead of forthrightly addressing our arguments — and the question that we presented for review — Oberg seeks to evade review through a variety of irrelevant and ill-conceived contentions. None provides any basis for denying the petition.

1. Oberg argues (Br. in Opp. 11-13) that the punitive and compensatory damages are not excessive under the Due Process Clause. That contention confuses substantive and procedural due process. Honda is not pressing a substantive due process argument in this Court; rather, the contention is that the denial of any excessiveness review in the Oregon courts deprived Honda of *procedural* protections to which it is entitled. Whether or not Honda might ultimately succeed in persuading a court that the verdict is in fact excessive is irrelevant to the question whether it has a right to try.[2]

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[1] Even the Oregon Supreme Court recognized that its decision conflicted with some of the state court decisions we cited. See Pet. App. 26a n.13. Accordingly, Oberg's bald assertion (Br. in Opp. 9-10) that the Oregon Supreme Court's decision does not conflict with any decision of this Court or any state supreme court or federal court of appeals is preposterous. Other, more recent, decisions with which the decision below conflicts include *Herman* v. *Sunshine Chemical Specialties, Inc.*, 627 A.2d 1081, 1085-1086 (N.J. 1993) ("[a]t a minimum, due process requires appellate review of the [punitive] award for reasonableness"), and *Kinard* v. *Crosby*, 433 S.E.2d 835, 839 (S.C. 1993) (a punitive damages regime is constitutional if, *inter alia*, "post-trial procedures enable the [trial] court to scrutinize the award" and "an appellate review process ensures that the award is reasonable and rational").

[2] This Court recently made the same point in reaching the merits of a procedural due process challenge to the federal forfeiture statute notwithstanding the fact that the property owner's likelihood of prevailing under the requested procedures was minimal:

Considering the merits of an excessiveness challenge at this stage would be particularly inappropriate because, contrary to Oberg's apparent assumption, Honda's claim would not be confined to whether the verdict is excessive as a matter of federal substantive due process. To the contrary, Oregon, like other states, has state-law standards governing the entitlement to compensatory damages and the imposition of punitive damages — standards that ordinarily would be more precise or exacting in various particulars than whatever comparatively modest limitations may be imposed on damages by substantive due process.[3] Accordingly, the first line of inquiry would be whether the verdict is excessive under the standards established by state law. That, of course, is not a function for this Court, which is part of the reason why the petition does not seek the Court's substantive review of the damages.[4]

> [T]the suggestion that this one petitioner must lose because his conviction was known at the time of seizure, and because he raises an as applied challenge to the statute, founders on a bedrock proposition: fair procedures are not confined to the innocent. *The question before us is the legality of the seizure, not the strength of the Government's case.*

United States v. *James Daniel Good Real Property*, No. 92-1180, slip op. 18 (Dec. 13, 1993) (emphasis added).

[3] Because Oregon's punitive damages statute provides specific criteria, Oberg is mistaken in asserting (Br. in Opp. 13) that the Oregon courts would need to develop new standards to evaluate excessiveness claims. In any event, there is nothing "improper" about urging the Oregon courts to "develop common law excessiveness standards" that are more rigorous than federal substantive due process standards.

[4] In any event, Oberg is quite wrong in contending (Br. in Opp. 12) that Honda has "no serious claim" that the punitive award is excessive. Although the jury may have found Honda's conduct to

2. Oberg repeatedly asserts (Br. in Opp. 11-12, 13, 17) that the Oregon Supreme Court in fact performed a comparative review of the punitive verdict in this case. That contention is erroneous. The Oregon Supreme Court did compare Oregon's procedures with the ones approved in *Haslip*, but that, of course, is not the same thing as providing review of the size of the verdict. In addition, the court mentioned in passing that the ratio of punitive damages to compensatory damages in this case is "similar" to the ratio in *Haslip*. Pet. App. 29a n.14. However, that single reference did not purport to embody a considered decision of an issue that the Oregon Supreme Court had expressly held in *Van Lom* and reaffirmed here to be outside its authority. Indeed, a mere comparison of ratios — with no consideration of any other relevant factor -- is unresponsive to the question whether the size of the punitive award can be justified under Oregon's

---

be "wanton," the indisputable truth of the matter is that the Consumer Product Safety Commission (CPSC), after extensively investigating three-wheeled ATVs, made no finding of defects and abandoned any effort to require a recall. Instead, it considered it sufficient to enter into a consent decree pursuant to which manufacturers agreed to send supplemental safety information to consumers and to cease producing three-wheeled ATVs pending development of a standard acceptable to the CPSC. See Pet. App. 74a-75a n.4. 56 Fed. Reg. 47,166, 47,168 (1991). When the relevant federal safety agency has concluded, after an extensive investigation, that a product is not so dangerous as to warrant a recall, a jury's imposition of a $5 million punishment *in a single case* — effectively trumping the agency's judgment — is precisely the kind of "unfair, arbitrary, or irrational seizure" of property (*TXO*, 113 S. Ct. at 2726 (Kennedy, J., concurring)) that raises serious substantive due process questions.

Similarly, Honda has a strong claim that the compensatory award is excessive. See Pet. 3 & n.2.

statutory criteria as well as the due process standards articulated by this Court in *TXO*.

3. Like the court below, Oberg suggests (Br. in Opp. 13) that procedural due process is satisfied by instructing the jury on the factors the Oregon legislature has concluded are relevant to a determination of the amount of punitive damages.[5] But no matter how well a jury is instructed, there remains an unacceptable risk that the jury's verdict will reflect arbitrary decisionmaking, rather than reasoned application of the guiding standards. Fundamental fairness requires that a defendant receive judicial review to ensure that the size of the verdict against it is not arbitrary or otherwise inconsistent with applicable legal principles.

4. Oberg places considerable reliance upon decisions of this Court stating that there is no constitutional right to *appellate* review. See Br. in Opp. 14-15.[6] That reliance is badly misplaced. This case is not about a system that permits

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[5] Oberg also adverts to Oregon's requirement that punitive *liability* be established by clear and convincing evidence and its rule barring evidence of the defendant's financial condition until the plaintiff has made out a prima facie case for punitive damages. Br. in Opp. 13. Although both safeguards are desirable, neither in the least bit serves to protect defendants from excessive punitive awards once liability for punitive damages has been established.

[6] Oberg also asserts (Br. in Opp. 17) that this Court has approved capital sentencing systems that prohibit *trial* judges from overriding a jury's decision to impose the death penalty. Oddly, he ignores that the very reason that this Court has upheld such systems is that they provide for careful *appellate* review of death sentences. See, *e.g.*, *Gregg* v. *Georgia*, 428 U.S. 153, 198 (1976) (plurality opinion); *id.* at 211 (White, J., concurring); *Jurek* v. *Texas*, 428 U.S. 262, 276 (1976) (plurality opinion). Accordingly, the death penalty cases provide no support for Oregon's denial of review of damages awards at any level.

trial court review but denies appellate review. It is about a system that denies review by *any* court whatever.[7]

As we pointed out in the petition (at 14 n.9), this Court need not decide at this stage (or even at the merits stage) whether appellate review of punitive damages awards is

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[7] Only one of Oberg's cases suggests that states can render a jury's determination completely unreviewable. *Chicago, Rock Island & Pacific Ry.* v. *Cole*, 251 U.S. 54 (1919). There, the Court held that, because the state did not need to permit a defense of contributory negligence at all, it was free to make the jury's factual determinations regarding that defense unreviewable. The present case, if anything, presents the polar opposite situation. Far from creating a new defense, Oregon has made available an additional (potentially boundless) vista of liability. Thus, the Court's statement in *Cole* that the defendant "cannot complain that its chance to prevail upon a certain ground is diminished when the ground might have been altogether removed" (*id.* at 56) has no application here.

Another of Oberg's cases indicates that states need not provide an appeal as of right from a trial judge's verdict in a misdemeanor case. *District of Columbia* v. *Clawans*, 300 U.S. 617, 627 (1937). There, unlike here, a judge was the initial decisionmaker, and the state did provide for discretionary appellate review, which this Court assumed would be exercised in "proper" cases. *Ibid.* Moreover, the Court's holding was based upon the fact that appeals from criminal convictions were not permitted as of right at common law. *Ibid.* By contrast, as we explained in the petition (at 7-8, 12-14), judicial review of damages awards was part of the common law and was incorporated into American jurisprudence from the outset.

Assuming, however, that *Cole* and *Clawans* could be construed to imply that due process requires no judicial review of jury verdicts, they would be in considerable tension with this Court's far more recent and more specific statements in *TXO* and *Haslip*. To the extent it exists, that tension is, if anything, a reason for granting the petition, not denying it.

constitutionally required. If it concludes that the Oregon courts' interpretation of the state constitution cannot be squared with the Due Process Clause, it will be up to the state legislature and the people of Oregon to determine in the first instance whether to permit trial court review, but deny appellate review. Given that Oregon generally provides appellate review of trial court rulings, there is no reason to suppose that it would choose to create a special rule with respect to the size of damages awards.

5. Oberg contends (Br. in Opp. 5-6, 10-11) that Honda did not adequately preserve its constitutional challenge to the compensatory award. Of course, even if Oberg were correct — and he is not — that would at most warrant limiting the grant of review to the punitive component of the judgment. However, no such limitation is necessary.

Oberg's contention that we failed to present our constitutional argument in the trial court is predicated upon the inaccurate assumption that the issue we raise in this Court is one of *substantive* due process. See Br. in Opp. 5 (stating that we challenged the award as excessive under state law rather than under the Due Process Clause). But our claim is that the Oregon courts' refusal to review the size of the compensatory award violated *procedural* due process.[8] We could not present that claim until after Honda's due process rights had been violated — *i.e.*, after the trial court declined to review the compensatory award. Accordingly, the failure to make a premature procedural due process claim at the trial level did not bar Honda from presenting such a claim in Oregon's appellate courts.

---

[8] Moreover, it is our position — with regard to both compensatory and punitive damages — that procedural due process requires the size of an award to be scrutinized for compliance not just with federal substantive due process, but also with state-law criteria.

Moreover, as Oberg concedes, Honda's petition for review in the Oregon Supreme Court expressly contended that the lower courts' refusal to review the compensatory verdict violated the Due Process Clause. Importantly, Oberg's brief in opposition did not assert that this issue had been waived. The issue thus was squarely before the Oregon Supreme Court.[9] Accordingly, Honda's procedural due process challenge is properly before this Court with respect to both punitive and compensatory damages.

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[9] Because Oberg never claimed that Honda had waived its procedural due process challenge to the lower courts' refusal to review the compensatory award, there is no basis for his contention (Br. in Opp. 10) that the Oregon Supreme Court's failure to expressly address the compensatory award constitutes an implicit holding of waiver. It is far more sensible to understand the Oregon Supreme Court's silence as constituting a recognition that separate discussion of compensatory damages was unnecessary: if punitive awards are unreviewable, *a fortiori* so too are compensatory awards. See *Van Lom*, 210 P.2d at 468-470 (rejecting contention that, because of quasi-criminal nature of punitive damages, the courts might have power to interfere with punitive verdicts even though they lack power to interfere with compensatory verdicts).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 93-644

In the Supreme Court of the United States

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HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD.; AND AMERICAN HONDA MOTOR CO., INC.,
Petitioners

v.

KARL L. OBERG,
Respondent

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF PETITIONERS

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QUESTION PRESENTED

Whether Oregon's denial of any judicial review of compensatory and punitive damages verdicts for excessiveness violates the Due Process Clause of the Fourteenth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-644

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD.; AND AMERICAN HONDA MOTOR CO., INC.,
Petitioners

v.

KARL L. OBERG,
Respondent

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the Supreme Court of Oregon (Pet. App. 1a-71a) is reported at 316 Or. 263 and 851 P.2d 1084. The opinion of the Court of Appeals of Oregon (Pet. App. 72a-88a) is reported at 108 Or. App. 43 and 814 P.2d 517. The order of the Circuit Court for Multnomah County denying petitioners' post-trial motions (Pet. App. 89a-90a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Oregon was entered on May 20, 1993 (Pet. App. 1a), and a timely filed petition for reconsideration was denied on July 27, 1993 (Pet. App. 92a-93a). The petition for certiorari was filed on October 25, 1993, and was granted on January 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

STATEMENT

1. This case involves a constitutional challenge to the State of Oregon's prohibition of judicial review, at both trial and appellate levels, of the amount of compensatory and punitive damages awarded by jury verdicts. Prior to 1910, trial and appellate courts in Oregon — like federal courts and courts in all other states — were "empowered to set aside a verdict and grant a new trial for excessive damages found by a jury or to order a remittitur of the excess as a condition to overruling a motion for a new trial." Lusk, *Forty-Five Years of Article VII, Section 3, Constitution of Oregon*, 35 Or. L. Rev. 1, 4 (1955). See, *e.g.*, *Adcock* v. *Oregon R.R.*, 77 P. 78, 79, 80 (Or. 1904); *Serles* v. *Serles*, 57 P. 634, 635 (Or. 1899). In that year, however, Article VII, Section 3 of the Oregon Constitution was amended to provide that "[i]n actions at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this State, unless the court can affirmatively say there is no evidence to support the verdict."

This amendment worked a "drastic abridgment" of the power of the Oregon courts to grant new trials. Lusk, *supra*, 35 Or. L. Rev. at 3. While Article VII, Section 3 permits a court to overturn a verdict when there is *no* evidence supporting the jury's finding of *liability*, the Oregon Supreme Court has interpreted the amendment to "eliminate, as an incident of jury trial in this state, the common-law power of a trial court to re-examine the evidence and set aside a verdict because it was excessive or in any other respect opposed to the weight of the evidence." *Van Lom* v. *Schneiderman*, 210 P.2d 461, 465 (Or. 1949). This restriction — which is far greater than the limitation on the powers of the federal courts imposed by the Seventh Amendment (see *ibid.*) — precludes excessiveness review of both compensatory and punitive damages awards. *Id.* at 470. See also *Fowler* v. *Courtemanche*, 274 P.2d 258, 275 (Or. 1954). Thus, as the Oregon Supreme Court has explained, prior to the amendment Oregon courts were permitted to set aside awards that were "'palpably or outrageously excessive,'" that were "'unreasonable or outrageous,'" that were so large "'as to strike every one with [their] enormity and injustice,'" or that "'no twelve men could reasonably have given'" (*Van Lom*, 210 P.2d at 464 (citations omitted)); after the amendment, Oregon courts had no power to disturb such awards. See *ibid.* In short, Article VII, Section 3 worked "the removal from the judges of th[e] power to correct a miscarriage of justice by ordering a new trial." *Id.* at 471.

2. In this case, respondent Karl Oberg was injured after a three-wheeled all-terrain vehicle manufactured and sold by petitioners (collectively "Honda")[1] overturned while he was attempting to climb a steep embankment. He subsequently brought suit against Honda, demanding $19,390.39 in special damages (his medical expenses), $900,000 in compensatory

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[1] A complete listing of Honda Motor Co., Ltd.'s, subsidiaries is set forth at Pet. App. 94a-97a.

general damages (principally for pain and suffering), and $5 million in punitive damages. The case was tried to a jury. At trial, evidence was placed before the jury establishing that Honda's net worth was some $4.9 billion, and at closing argument plaintiff's counsel told the jury:

> There's a very good reason why you were told, and this is an undisputed fact, that Honda has a net worth of 4.9 billion, yes, with a B, dollars. Our request to you is that you order Honda to pay one-tenth of one percent of their net worth in punitive damages, and that is $4.9 million.

Tr. 2838.

At the close of trial, the judge instructed the jury as follows regarding the amount of punitive damages it could award:

> If you decide [that the defendants acted with disregard for the rights of others] you may award punitive damages, although you are not required to do so, because punitive damages are discretionary.
>
> In the exercise of that discretion, you shall consider evidence, if any, of the following:
>
> First, the likelihood at the time of the sale [of the ATV] that serious harm would arise from defendants' misconduct.
>
> Number two, the degree of defendants' awareness of that likelihood.
>
> Number three, the duration of the misconduct.
>
> Number four, the attitude and conduct of the defendant[s] upon notice of the alleged condition of the vehicle.
>
> Number five, the financial condition of the defendant[s].

> And the amount of punitive damages may not exceed the sum of $5 million.

Pet. App. 23a n.11.[2]

By a vote of 11-1, the jury awarded plaintiff the $919,390.39 in compensatory damages and $5 million in punitive damages sought in the complaint. Because the jury found Oberg 20% at fault, the trial court reduced the compensatory award to $735,512.31 pursuant to Oregon's comparative negligence statute.

Honda then filed motions for a new trial and for judgment notwithstanding the verdict contending, among other things, that both the compensatory and the punitive verdicts were excessive. Honda argued that the $900,000 award for

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[2] The $5 million limit conformed to the amount sought by the plaintiff in his complaint. Under Oregon law, "the amount of damage alleged in the complaint does fix a maximum limit, and [the jury is] not permitted to award plaintiff more than that amount." Tr. 2941 (jury instructions). As for general compensatory damages, the court instructed the jury that "[t]he law does not furnish you with any fixed standard by which to measure the exact amount of general damages. The law does require that all compensation allowed be reasonable. You must apply your own considered judgment to determine the amount." Tr. 2942. The court added that in calculating general damages the jury should consider "all past physical and mental pain and suffering," "all future physical and mental pain and suffering," "the extent to which plaintiff's injuries will impair his ability to work and perform labor in the future," "any interference with plaintiff's normal and usual activities," and "the amount of future medical treatment" likely to be sought by the plaintiff. The court concluded that the general damages award could not exceed the $900,000 sought in the plaintiff's complaint. Tr. 2942. Finally, the jury was instructed that special damages include "[t]he reasonable value of medical care and services furnished in the treatment of plaintiff. The amount may not exceed the sum of $19,390.39." Tr. 2943.

non-economic injuries was insupportably high because it was more than 46 times the size of Oberg's special damages and because the interest alone on that award would yield more than four times the amount of general damages suggested by Oberg's counsel during closing argument.[3] In support of its contention that the compensatory award was excessive, Honda also cited cases from other jurisdictions drastically cutting compensatory awards under similar circumstances.[4]

Honda also attacked the $5 million punitive judgment as grossly excessive. Honda pointed out that (1) it was held liable for strict liability design defect and negligent failure to warn, not some more aggravated type of misconduct; (2) it was subject to numerous other lawsuits seeking large compensatory and punitive judgments for precisely the same

[3] Oberg's counsel suggested that an award of $50 per day – $18,300 per year – for the rest of Oberg's life would be an appropriate measure of his pain and suffering. If $900,000 were invested at the statutory rate of 9%, it would yield $81,000 per year – more than four times the amount Oberg's counsel suggested as reasonable – without invading the principal. Even if invested at the current 30-year treasury bond rate of approximately 6%, Oberg's judgment would yield $54,000 per year – roughly three times the amount his counsel suggested as reasonable.

[4] *E.g.*, *Thornton* v. *Montefiore Hosp.*, 469 N.Y.S.2d 979 (Sup. Ct. 1983) (ordering remittitur of award for pain and suffering from $1 million to $500,000; award for future medical expenses from $1 million to $34,480; and award for future lost earnings from $500,00 to $350,000), modified, 473 N.Y.S.2d 758 (App. Div. 1984) (ordering further remittitur of pain and suffering award to $400,000 and lost earnings award to $50,000); *Illey* v. *Hatley*, 693 S.W.2d 506, 512 (Tex. Ct. App. 1985) (suggesting remittitur of $1 million award to $174,000), writ ref'd n.r.e. (Dec. 11, 1985). For a more recent example, see *Sears, Roebuck & Co.* v. *Harris*, No. 1911519, 1993 WL 341147, at *15-*16 (Ala. Sept. 10, 1993) (ordering $5.5 million award reduced to $850,001).

design and warnings; (3) the punitive damages were more than 258 times Oberg's economic damages; (4) the $5 million penalty surpassed every other punitive award reflected in reported decisions of the Oregon courts; and (5) the punitive award was 50 times the size of the maximum fine for criminal assault (the most closely analogous crime under Oregon law).

The trial court denied Honda's motions without comment. Pet. App. 89a-90a.

3. The Oregon Court of Appeals affirmed the judgment. Pet. App. 72a-88a. Although the court reviewed all of Honda's other objections, it declined to entertain Honda's challenge to the size of the punitive verdict, concluding that the Oregon Constitution, as construed by the Oregon Supreme Court in *Van Lom*, prohibits both trial and appellate courts from setting aside a damages award on the ground that it is excessive. *Id.* at 86a-87a. In so ruling, the court rejected Honda's contention that the Due Process Clause of the Fourteenth Amendment requires judicial review of the size of punitive exactions challenged as excessive. *Id.* at 80a-87a. The court did not expressly address Honda's companion challenge to the size of the compensatory verdict, presumably concluding that its holding regarding punitive damages disposed of the issue as to compensatory damages as well.

The Oregon Supreme Court affirmed. Pet. App. 1a-71a. It noted that as interpreted in *Van Lom*, Article VII, Section 3 of the state constitution "restricts the power of Oregon trial and appellate courts to conduct [an excessiveness] review." *Id.* at 13a-14a & n.7. The court then stated: "We do not interpret [*Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991)] to hold that an award of punitive damages, to comport with the requirements of the Due Process Clause, always must be subject to a form of post-verdict or appellate review that includes the possibility of remittitur." *Id.* at 25a. Instead, the court found it dispositive that the *jury* was

instructed on the considerations relevant to an award of punitive damages, reasoning that "initial application of the constitutionally sufficient objective criteria [by the jury] * * * rather than post-hoc application of those criteria, increases the protective effect of the criteria." *Id.* at 26a.[5] Like the intermediate appellate court, the state supreme court did not separately address Honda's challenge to the size of the compensatory award.

Justice Peterson dissented. Pet. App. 34a-60a. He concluded that due process requires both "'meaningful and adequate review [of the size of punitive exactions] by the trial court'" and appellate review to "'make[] certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.'" *Id.* at 60a (quoting *Haslip*, 499 U.S. at 20, 21).[6]

SUMMARY OF ARGUMENT

A. Oregon's denial of judicial excessiveness review must be regarded as presumptively unconstitutional because it is a radical and aberrant departure from long-settled Anglo-American practice. By the mid-eighteenth century English courts routinely set aside excessive damages awards returned by juries; the same approach was uniformly followed by state courts in this country prior to the ratification of the Fourteenth Amendment. Indeed, judicial review of damages verdicts is so well entrenched that, as far as we are aware, *all*

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[5] The court also observed that judges may review both the correctness of the jury instructions and the sufficiency of the evidence to support a finding of punitive liability. Pet. App. 26a-27a.

[6] On September 16, 1993, the judgment of the court below was stayed by Justice O'Connor pending disposition of the case by this Court. Pet. App. 91a.

states but Oregon permit both trial and appellate judges to set aside excessive awards. Given "the importance of history and widely shared practice as concrete indicators of what fundamental fairness and rationality require" (*Schad* v. *Arizona*, 111 S. Ct. 2491, 2501 (1991) (plurality opinion)), Oregon's decision to withhold a safeguard that has been regarded as fundamental in all other Anglo-American jurisdictions from time immemorial must be held to run afoul of the Due Process Clause.

B. The judgment of history is confirmed by application of the three-part test articulated in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), for determining the conformity of state procedures to the requirements of due process. *First*, given the amounts of money involved in punitive damages litigation (and, for that matter, in products liability litigation generally), the private interest at stake may be enormous. *Second*, the likelihood of an erroneous deprivation of property under the Oregon system is substantial: it is beyond dispute that juries often base their verdicts on extra-legal considerations and may be led astray by bias, by naked redistributionist impulses, by a misunderstanding of the law, or by many other influences or deficiencies that should be unaceptable in our system of justice. These concerns are compounded where punitive damages are at issue, for the setting of an appropriate penalty is wholly outside the experience of lay men and women. And as many Members of this Court have noted, the likelihood of error is greatly increased in cases (such as this one) where the jury is urged to consider the wealth of an out-of-state corporate defendant. This common-sense judgment is confirmed by empirical data, which demonstrate that juries often err in setting punitive awards. *Third*, the State's interest here is insubstantial, since the added cost of providing judicial excessiveness review would be minimal — as is demonstrated by the willingness of every other state to provide such review.

In nevertheless upholding Oregon's system, the court below found it dispositive that the jury was instructed as to the considerations that are relevant to a punitive award. But it is doubtful that any jury charge, no matter how detailed, could obviate the need for judicial excessiveness review. The empirical evidence is overwhelming that juries often do not understand instructions, and even a jury that does grasp the judge's charge may fall subject to passion, bias, arbitrariness, or simple misjudgment. Equally as important, the charge in this case — which gave the jury a brief list of relevant factors — did not serve as a meaningful and effective constraint on the jury's discretion: the jury was not told whether those factors were exclusive, was not instructed on how to weigh the considerations it was given or how to balance them against one another, and could not have been given expertise in assessing punishments.

C. There is no novelty in Honda's contention that judicial excessiveness review is constitutionally required. To the contrary, this Court's decisions in *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991), and *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), plainly were premised on the understanding that such review is mandated by the Due Process Clause. *Haslip* emphasized that judicial review of the size of damages awards is an essential component of the common law method of imposing punitive damages. And in *TXO*, every Member of the Court recognized, either implicitly or explicitly, that judicial excessiveness review is constitutionally required. The decision below cannot be reconciled with that principle.

ARGUMENT

"The Anglo-American jury is a remarkable political institution" that has been "with us for so long that any sense of surprise over its main characteristics has perhaps somewhat dulled." H. Kalven & H. Zeisel, *The American Jury* 3 (Phoenix ed. 1970). But whatever its virtues, it is plain that

"[t]he jury would never have won [its] popularity * * * if it had not been developed and controlled by the action of the courts." 1 W.S. Holdsworth, *A History of English Law* 321 (7th ed. 1956). Indeed, the history of the institution is in large part a chronicle of attempts to implement "some regular method of controlling the verdicts of juries," an endeavor that has been recognized as "essential to the proper working of the jury system." *Id.* at 346. As a consequence, the practice of providing judicial excessiveness review of damages verdicts returned by juries is deeply rooted in English and American law; such review is provided by courts in England, by the federal courts, and by courts in every jurisdiction in the United States (other than the one below).

Oregon's categorical renunciation of judicial excessiveness review is a radical and aberrant departure from this otherwise universal practice. The Oregon system places no check on juries that are led astray by misunderstanding of the law, by bias, by naked redistributionist impulses, or by the many other "stimuli which the judge will exclude." H. Kalven & H. Zeisel, *supra*, at 498. By the same token, Oregon entrusts unreviewable authority to jurors with no prior experience in the administration of punishment, who may be both impassioned by perceived misconduct on the part of an out-of-state (here, foreign-owned) corporation and bedazzled by evidence of the defendant's wealth. It therefore is no surprise, as a distinguished former justice of the court below has observed, that "juries in Oregon, as elsewhere, do occasionally return verdicts which violate the principles of justice." Lusk, *supra*, 35 Or. L. Rev. at 25. Oregon's denial of judicial excessiveness review makes the policing of such egregious errors impossible and accordingly cannot be squared with the "requirement of 'fundamental fairness'" expressed by the Fourteenth Amendment's Due Process Clause. *Lassiter* v. *Dept. of Social Services*, 452 U.S. 18, 24 (1981).

A. Oregon's Total Denial Of Judicial Excessiveness Review Of Jury Verdicts Departs Dramatically From Deeply Ingrained Traditions Of Anglo-American Law.

1. This Court, "of course, [has] relied on history and 'widely shared practice' as a guide to determining whether a particular state practice so departs from an accepted norm as to be presumptively violative of due process." *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2720 (1993) (plurality opinion) (citation omitted). Here, that guide points clearly towards the unconstitutionality of the Oregon system: the practice of providing judicial review of the size of damages verdicts (whether punitive or compensatory) is deeply engrained and almost universally recognized in Anglo-American law.

As long ago as the mid-seventeenth century, English courts granted new trials in cases where juries returned verdicts against the weight of the evidence,[7] and the practice

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[7] See, *e.g.*, *Wood* v. *Gunston*, 82 Eng. Rep. 864, 867 (Upper Bench 1655); *Anon.*, 83 Eng. Rep. 775 (K.B. 1661); *Anon.*, 83 Eng. Rep. 1288 (K.B. 1665); *Duke of Richmond* v. *Wise*, 86 Eng. Rep. 86 (K.B. 1671). See generally 1 Holdsworth, *supra*, at 346. Even prior to that time it had been recognized that control of the jury was necessary, although judicial oversight of the jury took a different form before the mid-seventeenth century. In their original role, members of the jury functioned as witnesses as well as triers of fact; they were to reach a verdict on the basis of their personal knowledge of the transaction at issue. See *id.* at 333-334; Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 Am. J. Legal Hist. 201, 203-205 (1988). Formal judicial review of verdicts returned by such juries was logically impossible because the jurors were expected to consider information not available to the judge. Instead, courts relied to some degree on informal controls (such as telling a jury how to decide a case or requiring it to redeliberate when its verdict

was settled in all English courts by the mid-eighteenth century.[8] In particular, as Justice O'Connor demonstrated in

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seemed suspect) and on fining juries that reached verdicts against the weight of the evidence. See *id.* at 211 & nn. 62-63; Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chi. L. Rev. 263, 285-298 (1978). But during this period jury control was principally exercised through the attaint, which involved the convening of a 24-man jury that, when a doubtful verdict had been returned, would try the first jury for perjury. "This was only logical at a time when every jury spoke out of its own knowledge of the facts involved in the case. * * * If such jurymen returned a verdict which was demonstrably false, and in spite of their own better knowledge of the facts, then it was obvious that they had committed perjury and deserved the punishment provided for attainted juries" — imprisonment, confiscation of goods, and a declaration that "'they themselves forever thenceforward be esteemed in the eye of the law infamous.'" T.F.T. Plucknett, *A Concise History of the Common Law* 131 (5th ed. 1956) (citation omitted). See Mitnick, *supra*, 32 Am. J. Legal Hist. at 209-210. This cumbersome institution never worked well, however (in part because attaint juries themselves proved unreliable), and attaint fell into disfavor by the beginning of the seventeenth century, a time when petit jurors had ceased to function as witnesses. See Plucknett, *supra*, at 132-134; Mitnick, *supra*, 32 Am. J. Legal Hist. at 205-212. It was "[i]n response to the crisis of jury control caused by the decline of the attaint and the prohibition against fining [recalcitrant jurors], [that] the judges turned to the new trial as a remedy for an erroneous verdict in civil cases." *Id.* at 211-212 (citation omitted). See Plucknett, *supra*, at 135-136.

[8] See, *e.g.*, *R.* v. *Bewdley*, 24 Eng. Rep. 357, 359 (K.B. 1712); *Musgrave* v. *Nevinson*, 93 Eng. Rep. 715 (K.B. 1723); *Dormer* v. *Parkhurst*, 95 Eng. Rep. 414, 418 (K.B. 1738); *Berks* v. *Mason*, 96 Eng. Rep. 874, 874-875 (K.B. 1756); *Bright* v. *Eynon*, 97 Eng. Rep. 365, 366, 368 (K.B. 1757); *Norris* v. *Freeman*, 95 Eng. Rep. 921 (C.P. 1769); 3 W. Blackstone, *Commentaries on the Laws of England* 387 (1768). See generally T.F.T. Plucknett, *supra*, at 136 ("the work [of authorizing the order of new trials] was half done

TXO, "courts at common law in England traditionally would strike any [damages] award that appeared so grossly disproportionate as to evidence caprice, passion, or bias." 113 S. Ct. at 2729-2730 (O'Connor, J., dissenting) (footnote omitted). This power has been exercised at least since 1655 (see *Wood* v. *Gunston*, 82 Eng. Rep. 867 (Upper Bench)) and was so well settled by the middle part of the next century that Lord Mansfield — who "was no innovator in legal matters" (A.W.B. Simpson, *A History of the Common Law of Contract* 618 (1975)) — was led to comment that "there was no doubt but that the Court had the power of taking the opinion of a second jury in any case where the damages were excessive." *Ducker* v. *Wood*, 99 Eng. Rep. 1092 (K.B. 1786).[9] This was true in cases involving both compensatory and punitive awards. Indeed, the first English decision to discuss the doctrine of punitive damages itself recognized that "a new trial for excessive damages" could be awarded in "a glaring

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by 1700, and declared to be complete in 1757" in *Bright*); Mitnick, *supra*, 32 Am. J. Legal Hist. at 208-216.

[9] See, *e.g.*, *Townsend* v. *Hughes*, 86 Eng. Rep. 994, 997 (C.P. 1677); *Ash* v. *Ash*, 90 Eng. Rep. 526 (K.B. 1701); *Chambers* v. *Robinson*, 93 Eng. Rep. 787, 788 (K.B. 1726); *Gilbert* v. *Burtenshaw*, 98 Eng. Rep. 1059, 1060 (K.B. 1774); *Fabrigas* v. *Mostyn*, 96 Eng. Rep. 549 (K.B. 1774); *Leith* v. *Pope*, 96 Eng. Rep. 777, 778 (K.B. 1782); *Duberly* v. *Gunning*, 4 Durm. & E. 651, 657 (K.B. 1792). See also, *e.g.*, *Hewlett* v. *Cruchley*, 128 Eng. Rep. 696, 698 (C.P. 1813) ("it is now well acknowledged in all the courts of Westminster-hall, that whether in actions for criminal conversation, malicious prosecutions, words, or any other matter, if the damages are clearly too large, the Courts will send the inquiry to another jury"); D. Graham, *A Treatise on the Law of New Trials in Cases Civil and Criminal* 1127-1130 (2d ed. 1855). See generally *Browning-Ferris of Vermont Industries, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 272 (1989).

case * * * of outrageous damages." *Huckle* v. *Money*, 95 Eng. Rep. 768, 768-769 (K.B. 1763).

In this country as well, "[u]nder the traditional common-law approach" the "jury's determination [of damages] is * * * reviewed by trial and appellate courts to ensure that it is reasonable." *Haslip*, 499 U.S. at 15. See *TXO*, 113 S. Ct. at 2726 (Scalia, J., concurring in the judgment); *id.* at 2730 (O'Connor, J., dissenting). For example, in the seminal case involving the power of federal courts to use remittitur, Justice Story, sitting as Circuit Justice, explained:

> As to the question of excessive damages, I agree, that the court may grant a new trial for excessive damages. * * * It is indeed an exercise of discretion full of delicacy and difficulty. But if it should clearly appear that the jury have committed a gross error, or have acted from improper motives, or have given damages excessive in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case.

Blunt v. *Little*, 3 F. Cas. 760, 761-762 (D. Mass. 1822) (ordering new trial unless plaintiff agreed to remittitur). In the years prior to the adoption of the Fourteenth Amendment the same principle was applied by state courts across the country.[10]

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[10] See, *e.g.*, *Pleasants* v. *Heard*, 15 Ark. 403, 406 (1855) (new trial where damages award "shocks our sense of justice"); *Worster* v. *Proprietors of Canal Bridge*, 33 Mass. 541, 547-548 (1835) (new trial where damages "manifestly exorbitant"); *Sampson* v. *Smith*, 15 Mass. 365, 367 (1819) ("[w]e entertain no doubt of the authority of the court to set aside a verdict on account of the largeness of the damages"); *Travis* v. *Barger*, 24 Barb. 614, 629 (N.Y. App. Div. 1857) (new trial where award "flagrantly outrageous and extravagant"); *Collins* v. *Albany & Schenectady*

So well entrenched is the concept of judicial review of damages verdicts that, as far as we are aware, Oregon stands alone among the states in denying such review entirely. Every state other than Oregon gives trial judges the authority to grant new trials, or to condition the denial of a new trial on a plaintiff's acceptance of a remittitur, when the judge concludes that excessive damages have been awarded. And, as best we can tell, all other states provide in addition for some degree of appellate review of the trial court's excessiveness determination.[11] Indeed, the Oregon Supreme Court

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R.R., 12 Barb. 492, 495 (N.Y. Sup. Ct. 1852) ("The right of the court * * * to interfere, when the damages found by the jury are clearly excessive * * * has never been denied."); *Diblin* v. *Murphy*, 3 Sand. 19 (N.Y. Super. Ct. 1849) (ordering new trial unless plaintiff agreed to remittitur); *Thompson* v. *Morris Canal & Banking Co.*, 2 Harr. 480, 486-487 (N.J. 1840); *Guerry* v. *Kerton*, 18 S.C.L. (2 Rich.) 507 (Ct. App. 1846). See also *Belknap* v. *Boston & Maine R.R.*, 49 N.H. 358, 372 (1870) (new trial where jury "acted under the influence of a perverted judgment"); *McCarthy* v. *Niskern*, 22 Minn. 90, 91-92 (1875) (verdict set aside if "enormously in excess of what may justly be regarded as compensation"). The earliest American treatises on damages treated this principle as settled. See G. Field, *Law of Damages* 685-686 (1876) (new trials where jury awards "flagrantly excessive"); Washburn, *Study and Practice of Law* 246 (5th ed. 1876) (new trials serve "as a safeguard against the passions, prejudices, and mistakes to which juries are at times subject"); 1 J. Sutherland, *Law of Damages* 810 (1882) (new trials where jury acts with "perverted judgment").

[11] As of 1961, at least 47 of the 50 states afforded appellate review of a trial court's denial of a new trial or remittitur on grounds of the excessiveness of the verdict. *Dagnello* v. *Long Island R.R.*, 289 F.2d 797, 798-799 & n.1 (2d Cir. 1961) (citing cases from every state other than Alaska, Maryland, and Oregon). Since that time, appellate courts in Alaska and Maryland have recognized and exercised their authority to order new trials or

has recognized its "lonely eminence" in this regard. *Van Lom*, 210 P.2d at 471. See also *Rogers* v. *Hill*, 576 P.2d 328, 335 (Or. 1978) (Tongue, J., specially concurring) ("[n]o other state has adopted such a constitutional limitation upon the common law powers of the courts"); Lusk, *supra*, 35 Or. L. Rev. at 28 ("[s]o far as can be ascertained by an intensive search, no other state has ever gone to such lengths").

Against this background, the Oregon system comes to this Court with a heavy presumption of unconstitutionality. Oregon's practice of denying judicial excessiveness review is a "freakish" one that "finds no analogue in history or in the * * * law of other jurisdictions." *Schad* v. *Arizona*, 111 S. Ct. 2491, 2501 (1991) (plurality opinion). And given "the importance of history and widely shared practice as concrete indicators of what fundamental fairness and rationality require" (*ibid.*), Oregon's decision to withhold safeguards that have been provided by all other Anglo-American jurisdictions from time immemorial runs afoul of the Due Process Clause. Cf. *Solem* v. *Helm*, 463 U.S. 277, 290-292 (1983).

B. Oregon's Denial Of Judicial Excessiveness Review Deprives Litigants Of Procedures Essential To Ensure Fundamental Fairness.

The relevance to due process analysis of Oregon's departure from common-law practice is plain. While there has been some disagreement on the Court about the proper constitutional approach when traditional procedures that had currency at the time of ratification of the Fifth or Fourteenth

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remittitur because of an excessive damages award left standing by a trial court. See, *e.g.*, *City of Nome* v. *Ailak*, 570 P.2d 162, 173-174 (Alaska 1977); *Alexander & Alexander, Inc.* v. *B. Dixon Evander & Assocs., Inc.*, 596 A.2d 687, 709-711 (Md. Ct. Spec. App. 1991), cert. denied, 605 A.2d 137 (Md. 1992). To our knowledge, no state that afforded appellate review in 1961 has withdrawn it subsequently.

Amendments are themselves attacked (compare *Haslip*, 499 U.S. at 17-18 (majority opinion), and 60-63 (O'Connor, J., dissenting), with *id.* at 34-38 (Scalia, J., concurring in the judgment)), there is no doubt that when a State chooses to deviate from traditionally accepted procedures, those who would defend the State's aberrant approach have a high burden:

> [C]onsistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government.

Twining v. *New Jersey*, 211 U.S. 78, 101 (1908). See *Haslip*, 499 U.S. at 32 (Scalia, J., concurring in the judgment); *Burnham* v. *Superior Court*, 495 U.S. 604, 622 (1990) (opinion of Scalia, J.).

In analyzing the constitutional adequacy of such novel state procedures in the non-criminal context, the Court makes use of the familiar three-part test articulated in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), which it has "characterized * * * as 'a general approach for testing challenged procedures under a due process claim.'" *Medina* v. *California*, 112 S. Ct. 2572, 2576 (1992), quoting *Parham* v.

J.R., 442 U.S. 584, 599 (1979).[12] Under this approach, the Court must

> consider [1] the private interest affected by the official action; [2] the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and [3] the Government's interest, including the administrative burden that additional procedural requirements would impose.

United States v. *James Daniel Good Real Property*, No. 92-1180, slip op. at 9 (U.S. Dec. 13, 1993). See *Mathews*, 424 U.S. at 335. Consideration of these three elements demonstrates that Oregon's refusal to provide any judicial review of the size of a jury verdict violates due process.

1. *The Private Interest.* First, the private property interest at stake may be "enormous." *Haslip*, 499 U.S. at 54 (O'Connor, J., dissenting).[13] Money, in whatever amount, is a core property interest. See, *e.g.*, *Board of Regents* v. *Roth*, 408 U.S. 564, 571-572 (1972) (stating that the concept

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[12] See, *e.g.*, *Burns* v. *United States*, 111 S. Ct. 2182, 2192-2193 (1991) (Souter, J., dissenting) ("The *Mathews* analysis has * * * been used as a general approach for determining the procedures required by due process whenever erroneous governmental action would infringe an individual's protected interest"); *Washington* v. *Harper*, 494 U.S. 210, 229 (1990); *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 542-543 (1985); *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982).

[13] There can be no doubt that a damages verdict, compensatory or punitive, constitutes a deprivation of property. In fact, the proposition is so self-evident that this Court routinely analyzes due process challenges to civil trial procedures without even pausing over the threshold question whether a property interest protected by the Due Process Clause exists. See, *e.g.*, *TXO*, *supra*; *Haslip*, *supra*; *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985).

of "property" is not limited to "real estate, chattels, or money"). Moreover, in today's litigation climate the *amount* of money involved can be staggering: the size of a damages award is limited only by the jury's (or, as in this case, the plaintiff's) imagination, and seven-, eight-, and even nine-figure judgments are now common (and, everywhere other than Oregon, are commonly reduced).[14]

Oregon is no exception; in addition to the judgment in this case, Oregon juries recently have returned verdicts of

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[14] See, *e.g.*, *Texaco, Inc.* v. *Pennzoil Co.*, 729 S.W.2d 768, 866 (Tex. Ct. App. 1987) ($3 billion punitive award reduced to $1 billion), cert. dismissed, 485 U.S. 994 (1988); *Grimshaw* v. *Ford Motor Co.*, 174 Cal. Rptr. 348, 389-391 (Cal. Ct. App. 1981) (affirming order granting new trial unless plaintiff accepted remittitur of punitive judgment from $125 million to $3.5 million); *Award Is Slashed*, Nat'l L.J., Aug. 31, 1992, at 6 (reporting that Illinois trial court had ordered $124.5 million punitive award against The Upjohn Company remitted to $35 million); *Alexander & Alexander*, 596 A.2d at 710-711 (jury imposed $40 million punitive exaction; trial court ordered remittitur to $12.5 million; appellate court ordered new trial on ground that $12.5 million was grossly excessive); *Republic Ins. Co.* v. *Hires*, 810 P.2d 790, 793 (Nev. 1991) (reducing punitive award from $22.5 million to $5 million); *State Farm Mut. Auto. Ins. Co.* v. *Zubiate*, 808 S.W.2d 590, 605-606 (Tex. Ct. App. 1991) (ordering new trial unless plaintiff accepted remittitur of punitive award from $15 million to $600,000), writ denied (Sept. 18, 1991); *Machine Maintenance & Equip. Co.* v. *Cooper Indus., Inc.*, 661 F. Supp. 1112, 1117-1118 (E.D. Mo. 1987) (ordering new trial unless plaintiff accepted remittitur of punitive award from $10 million to $100,000); *Sears, Roebuck & Co.* v. *Harris*, No. 1911519, 1993 WL 341147, at *15-*16 (Ala. Sept. 10, 1993) (ordering $5.5 million compensatory judgment reduced to $850,001). See generally *Huge Jury Awards Often Don't Survive Appeals and Motions*, Nat'l L.J., Jan. 25, 1993, at S20. A more complete list of recent remittiturs and reductions appears in Appendix A, *infra*.

approximately $9 million and $7 million. See *Eulrich* v. *Snap-On Tools Corp.*, 853 P.2d 1350 (Or. Ct. App.), rev. denied, 859 P.2d 540 (Or. 1993), cert. pending, No. 93-697; *Lovejoy Specialty Hospital, Inc.* v. *Advocates for Life, Inc.*, 855 P.2d 159 (Or. Ct. App.), rev. denied, 863 P.2d 1267 (Or. 1993). And the significance of the private interest is compounded by the "quasi-criminal" nature of a punitive judgment (*Haslip*, 499 U.S. at 19), for a defendant who is forced to pay a large punitive award will suffer serious reputational injury. See *id.* at 54 (O'Connor, J., dissenting); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 281 (1983). Cf. *Addington* v. *Texas*, 441 U.S. 418, 424 (1979). Defendants have an obvious, strong, and legitimate interest in not being made to pay such judgments in the absence of adequate procedural safeguards.

2. *The Likelihood of Error.* a. There is a real and substantial risk that, in the absence of some form of judicial review, defendants will suffer an erroneous deprivation of their property. It has been said that "[t]he jury system has long been a guarantor of fairness, a bulwark against tyranny, and a source of civic values" (*TXO*, 113 S. Ct. at 2728 (O'Connor, J., dissenting)), and we certainly do not take issue with that proposition.[15] But one need not share Mark Twain's rather more jaundiced view of the jury — that it "would prove the most ingenious and infallible agency for

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[15] It may be noted, however, that "[a]lthough the jury has been, throughout its history, 'eulogized by judges and lawyers in terms more glowing than have been applied to any other institution,' it has in reality always been viewed ambivalently as an adjudicative body." Ellis, *Punitive Damages, Due Process, and the Jury*, 40 Ala. L. Rev. 975, 995 (1989) (footnotes omitted). "[V]irtually from its inception, it has been the subject of deep controversy, attracting at once the most extravagant praise and the most harsh criticism." H. Kalven & H. Zeisel, *supra*, at 4.

defeating justice that human wisdom could contrive" (M. Twain, *Roughing It* 256 (Signet ed. 1980) (emphasis in original))[16] — to recognize that juries are capable of making serious errors.

It could hardly be otherwise. As the leading scholars of the subject have observed,

> A jury is composed of untrained citizens, drawn randomly from the eligible population, convened briefly for a particular trial, entrusted with great official powers, permitted to deliberate in secret, to render a verdict without explanation, and, without any accountability then or ever, to return to private life.

M. Saks, *Jury Verdicts: The Role of Group Size and Social Decision* 6 (1977). See H. Kalven & H. Zeisel, *supra*, at 3. While a whole constellation of considerations leads judges to arrive (by and large) at well-reasoned and objectively "correct" decisions, "the incentives to individuals as members of a jury to base their decisions on only the evidence, to follow the judge's instructions, and to arrive at a 'correct' decision seem almost nonexistent." Ellis, *supra*, 40 Ala. L. Rev. at 998. Students of the jury thus have found that juries sometimes "appl[y] evidence incorrectly, award[] compensation for expenses they were not supposed to

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[16] Twain added that "[t]he jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury. It is a shame that we must continue to use a worthless system because is *was* good a thousand years ago." M. Twain, *supra*, at 257 (emphasis in original). Or to paraphrase Judge Jerome Frank, "the jury applies law it doesn't understand to facts it can't get straight." Vidmar, *Foreward: Empirical Research and the Issue of Jury Competence*, 52 Law & Contemp. Probs. 1, 1 (1989) (footnote omitted) (citing J. Frank, *Courts on Trial: Myth and Reality in American Justice* (1945)).

consider, and consider[] extralegal factors in determining liability and punitive awards." M. Selvin & L. Picus, *The Debate Over Jury Performance: Observations From a Recent Asbestos Case* ix (1987). More generally, it seems clear from the work of social scientists that juries "are occasionally biased against corporate defendants." Greene, *On Juries and Damage Awards: The Process of Decisionmaking*, 52 Law & Contemp. Probs. 224, 246 (1989). See A. Chin & M. Peterson, *Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials* 42-45 (1985) (in personal injury trials, corporate and governmental defendants more likely to be found liable and to be required to pay larger damages); Hans & Ermann, *Responses to Corporate Versus Individual Wrongdoing*, 13 Law & Human Behavior 151 (1989) (same).

Moreover, even the best-intentioned jury, as Blackstone (himself a great defender of the institution) observed more than two centuries ago, may return an incorrect verdict because of "inexperience in business, incapacity, misapprehension, inattention to circumstances, and a thousand other innocent causes." 3 W. Blackstone, *supra*, at 389. After all, "[t]here is no guarantee that members of a particular jury may not be quite unusually ignorant, credulous, slow-witted, narrow-minded, biased or temperamental." G. Williams, *The Proof of Guilt* 272 (3d ed. 1963). It thus is inarguable that juries' decisions "can be shaped by influences impermissible in our system of justice. In fact, they are more susceptible to such influences than judges." *TXO*, 113 S. Ct. at 2728 (O'Connor, J., dissenting).

b. The likelihood of juror error that exists in all cases is greatly increased by the nature of the question posed to the jury when punitive damages are at issue. While juries are thought to be especially effective in making factual determinations that are within the common experience of lay men and women, "determining the amount of punitive damages smells more like sentencing than fact-finding. It does not require answering a 'what happened' question.

Rather, it embodies the question, 'what ought to happen' to the defendant, an issue typically committed to the judge, not the jury, in a criminal case." Ellis, *supra*, 40 Ala. L. Rev. at 1004.

Indeed, as the Court has noted, "highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties * * * . These are the kinds of calculations traditionally performed by judges." *Tull* v. *United States*, 481 U.S. 412, 427 (1987). "Determining a fair penalty and one that will likely bring about an appropriate level of deterrence, neither too much nor too little, does not invoke a familiarity of what the Court called in *Railroad Co. v. Stout*[, 84 U.S. (17 Wall.) 657, 664 (1873),] 'the common affairs of life.' * * * Such a sanction represents an example of those 'issues . . . presented for adjudication which are far removed from commonplace activities and accidents familiar to the man on the street.'" Ellis, *supra*, 40 Ala. L. Rev. at 1006 (footnotes omitted), quoting J. Fleming, *The American Tort Process* 113 (1988).

Jurors judging a punitive damages case thus labor under a significant handicap that derives from the nature of the institution. A jury considers its case in isolation; it lacks the information and experience needed to place the particular defendant's actions in context, and typically has no knowledge of the range of punishments to which comparable wrongdoers have been subjected. A jury is therefore far less able than a judge to devise a sanction that is appropriately proportioned to the relative wrongfulness of the defendant's conduct. See Wheeler, *supra*, 69 Va. L. Rev. at 286; Ellis, *supra*, 40 Ala. L. Rev. at 1007.

Moreover, the difficulty that a jury will have in reaching a correct decision is compounded by a feature of punitive damages regimes that seems calculated to *induce* an incorrect decision: in Oregon, as in many states, juries are informed of the defendant's wealth, and plaintiffs' counsel may urge

the jury — as happened in this case (see page 4, *supra*) — to transfer some of that wealth to the plaintiff.[17] It has long been a commonplace that juries bedazzled by evidence of the size and financial condition of a wrongdoer and feeling "antipathy to a wealthy, out-of-state corporate defendant" may surrender to "redistributionist impulses." *TXO*, 113 S. Ct. at 2725-2726 (Kennedy, J., concurring in part and concurring in the judgment). This unsurprising temptation means that evidence of wealth "may do more harm than good; jurymen may be more interested in divesting vested interests than in attempting to fix penalties which will make for effective working of the admonitory function." Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1191 (1931). See Abraham & Jeffries, *supra*, 18 J. Legal Stud. at 424; Ellis, *supra*, 40 Ala. L. Rev. at 996.

In *TXO*, seven Justices accordingly noted that "the emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the

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[17] Courts have permitted consideration of wealth in the assessment of punitive damages (see *TXO*, 113 S. Ct. at 2737-2738 (O'Connor, J., dissenting)), a practice that may make great sense in determining the appropriate level of punishment for an individual defendant. But commentators are virtually unanimous in the view that a *corporate* defendant's wealth has no rational connection to the setting of an appropriate penalty. See, *e.g.*, Abraham & Jeffries, *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. Legal Stud. 415, 421-422 (1989); Chapman & Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 Ala. L. Rev. 741, 824-826 (1989); Cooter, *Punitive Damages for Deterrence: When and How Much*, 40 Ala. L. Rev. 1143, 1176-1177 (1989); *Symposium Discussion, Punitive Damages*, 56 S. Cal. L. Rev. 155, 190-191 (1982) (comments by Professors Jack L. Carr and Malcolm E. Wheeler). Cf. *Zazu Designs* v. *L'Oreal, S.A.*, 979 F.2d 499, 508-509 (7th Cir. 1992) (Easterbrook, J.).

defendant is a non-resident." 113 S. Ct. at 2723 (Stevens, J., joined by Rehnquist, C.J., and Blackmun and Kennedy, JJ.). See *id.* at 2737, 2738 (O'Connor, J., joined by White and Souter, JJ., dissenting) ("Courts long have recognized that jurors may view large corporations with great disfavor. * * * [T]he temptation to transfer wealth from out-of-state corporate defendants to in-state plaintiffs can be quite strong.") In these circumstances, it would be the more remarkable if juries failed to return excessive verdicts with some regularity.

It may be added that, while these problems are magnified in cases involving punitive damages, they also are present to some degree where compensatory awards are at issue, particularly when the plaintiff seeks damages for intangibles such as pain and suffering. "Medical expense and economic loss do have some objective reality but the warrant to add pain and suffering gives the jury immediate freedom to price the injury subjectively." Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 Ohio St. L.J. 158, 161 (1958). Here, for example, the jury was told that "[t]he law does not furnish you with any fixed standard by which to measure the exact amount of general damages." Tr. 2942. And bias against corporate defendants (see page 23, *supra*) may infect a case even when evidence of wealth is not placed before the jury; that is especially so when the defendant is a well-known foreign-owned corporation, as is true here. As Judge Jerome Frank observed, "[t]hat the defendant is a wealthy corporation and the plaintiff is a poor boy * * * often determine who will win or lose." J. Frank, *Law and the Modern Mind* 177-178 (1949).

c. Common sense thus suggests that jurors will make errors in setting damages awards. But we need not rely on logic to establish that proposition: empirical data demonstrate that trial and appellate judges frequently find it necessary to reduce or remit damages awarded by juries. These actions are significant because every case in which a judge finds an

award excessive is, by definition, a case in which the jury's award, if uncorrected, would have worked an erroneous deprivation of property.[18]

We have reviewed all reported cases, state and federal, in which punitive damages awards were contested as excessive during 1992 and 1993.[19] In 90 of the 271 cases in our sample, the awards were set aside altogether. (These cases are listed in Appendix C, *infra*.) And most important for present purposes, of the remaining 181 cases, 51 — or more than 28% — saw reductions in the punitive damages award. (Cases in which awards were reduced or remitted are listed in Appendix A, *infra*; cases in which excessiveness

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[18] A court will reduce a punitive judgment when the award runs afoul of the constraints on punitive verdicts that are set by state law (typically, as in Oregon, see Pet. App. 24a, that the award serve the purposes of punishment and deterrence and that it not be the product of passion or bias). The Due Process Clause mandates that the state, having imposed these constraints on the deprivation of property, minimize departures from the state-law standards. See generally *Bell* v. *Burson*, 402 U.S. 535, 541 (1971); *Logan*, 455 U.S. at 433-434. In addition, of course, a majority of the Members of this Court have recognized that "the Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.'" *TXO*, 113 S. Ct. at 2718 (plurality opinion) (citation omitted). See *id.* at 2731 (O'Connor, J., dissenting) ("It is * * * common ground that an award can be so excessive as to violate due process."). An award that is constitutionally excessive plainly also must be viewed as working an erroneous deprivation of property.

[19] To construct our sample, we searched the Westlaw electronic database for all cases involving punitive damages that discuss remittitur, reductions, or excessiveness. In technical terms, our search — drawn to be as inclusive as possible — was "punitive or exemplary/50 reduc! or remit! or exces! & da (>1991)." We conducted the search in Westlaw files "allstates" and "allfeds."

arguments were rejected are listed in Appendix B, *infra*.)[20] These findings are consistent with the conclusions of all of the published empirical studies on the subject.[21]

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[20] Concededly, a survey of reported decisions makes use of a sample that is to some extent skewed. Reported decisions are in large measure appellate decisions, and the cases most likely to be appealed are those where the damages awards are the largest (and therefore, presumably, the most likely to be reduced). See generally Landes & Posner, *New Light on Punitive Damages*, Regulation (Sept./Oct. 1986) at 34. On the other hand, such a survey omits the large volume of cases in which awards are reduced by trial courts or are settled at a significant discount while an appeal is pending; there is reason to believe that there are a substantial number of such cases. See note 21, *infra*. Whatever the precise numbers, then, our survey establishes beyond dispute that punitive verdicts returned by juries are erroneous in a great many cases. And to the extent that our survey sample is skewed towards cases (such as this one) involving larger punitive awards, those are, of course, the cases in which the greatest deprivations of property take place.

[21] The most oft-cited empirical study of punitive damages, which was conducted by the RAND Institute for Civil Justice, found that punitive awards were reduced or eliminated in 32 out of a sample of 68 punitive verdicts returned in two jurisdictions between 1979 and 1983. Twenty-one of the 32 awards were reduced through post-judgment settlement. Larger verdicts were much more likely to be reduced; although awards were reduced in just under 50% of all cases, awards where reductions took place "involved nearly 90 percent of the total money at stake." M. Peterson, S. Sarma, & M. Shanley, *Punitive Damages: Empirical Findings* 28 (RAND Institute for Civil Justice 1987). The study found that "[n]early every large award received some reduction — nine of 10 cases with a punitive award greater than $50,000." *Id.* at 30. Other studies have reached similar results. See U.S. Gen. Acct. Office, Report to the Chairman, Subcomm. on Commerce, Consumer Protection, and Competitiveness, Comm. on Energy and Commerce, House of Representatives, *Product Liability, Verdicts and Case Resolution in Five States*, GAO/HRD-89-99 42 (Sept. 1989) (post-trial reductions in 82% of 23 punitive verdicts studied); Wheeler, *supra*, 69 Va. L. Rev. at 288 (of 45 appellate decisions in New York in decade before 1983 addressing punitive damages, punitive awards remitted or reversed in 35); Landes & Posner, *supra*, Regulation 35 (punitive award reversed in six of 10 federal appellate cases addressing punitive damages, and reduced in one); Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes With Empirical Data*, 78 Iowa L. Rev. 1, 54-56 (1992) (of 260 products liability punitive awards between 1965 and 1990, punitive awards were reversed in approximately 23%, reduced in 8.5%, and settled in 39.6%; in the 80 cases settled prior to appeal, 19 plaintiffs settled for no punitive damages and another 17 settled for a reduced award); M. Rustad, *Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts* 30-32 (Roscoe Pound Foundation 1991) (slightly more than half of products liability punitive awards reversed or adjusted downwards in 1970s and 1980s). While these studies are not precisely on point here because they do not, for the most part, distinguish between post-verdict decisions setting aside awards on the ground that the jury should not have imposed punitive liability at all (which may occur in Oregon) and those decisions finding awards excessive (which may not occur in Oregon), they clearly show that jury error in this area occurs with great frequency. (We note that reduction of punitive awards through post-trial settlement, which appears to be common, almost surely is influenced by the availability of excessiveness review.)

Against this background, it is simply indisputable that a very substantial percentage of punitive jury awards are excessive and thus legally erroneous. Indeed, studies written from the perspective of — and often cited by — tort plaintiffs have found that "[j]udges frequently reverse or remit punitive damage awards in the postverdict stage." Rustad, *supra*, 78 Iowa L. Rev. at 51. As a consequence, advocates for plaintiffs have themselves recognized that "punitive damages are appropriately kept in check by judicial controls." Rustad, *supra*, 78 Iowa L. Rev. at 58. See Daniels & Martin, *Myth*

and Reality in Punitive Damages, 75 Minn. L. Rev. 1, 9 (1991) ("proponents [of the present punitive damages system] argue that trial court control and appellate review are adequate safeguards against potential jury abuse").[22]

Such checks on jury discretion are no less necessary in Oregon. The Oregon Supreme Court has itself recognized that its interpretation of Article VII, Section 3 left erroneous jury awards undisturbed in particular cases. See *Fowler* v. *Courtemanche*, 274 P.2d at 275 ("If this court were authorized to exercise its common law powers, we would unhesitatingly hold that the award of $35,000 as punitive damages was excessive * * *."); *Van Lom*, 210 P.2d at 462 ("[t]he court is of the opinion that the verdict * * * is excessive"). See also Lusk, *supra*, at 25 ("juries in Oregon, as elsewhere, do occasionally return verdicts which violate the principles of justice"). To be fundamentally fair, a procedural regime must provide a method designed to correct such errors.

d. In nevertheless holding the Oregon system constitutional, the court below relied on essentially one consideration: Oregon juries are instructed as to the factors that are relevant to the setting of a punitive award.[23] The

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[22] The availability of meaningful judicial review of the size of punitive awards was repeatedly invoked in *TXO* as one of the principal reasons why other checks on the administration of punitive damages are unnecessary. See, *e.g.*, Brief of Amicus Curiae Association of Trial Lawyers of America in Support of Respondents at 15-16; Brief of *Amicus Curiae* National Association of Securities and Commercial Law Attorneys in Support of Respondents at 25-30; Brief of Trial Lawyers for Public Justice As Amicus Curiae in Support of Respondents at 4; Brief of the Alabama Trial Lawyers Association as Amicus Curiae in Support of Respondents at 8.

[23] The court below also noted (Pet. App. 27a) that trial and appellate courts may review the sufficiency of the evidence

court opined that these instructions "are detailed and objective, resulting in their also being constitutionally sufficient. The criteria need not be applied in post-verdict or appellate review, but are permissibly — even preferably — applied by juries in the initial determination of punitive damages awards." Pet. App. 32a. But whatever the adequacy of the instructions for the purpose of informing the jury of its responsibility (as to which see generally *Haslip*, 499 U.S. at 19-20), they plainly did not cure the constitutional violation in this case.

As an initial matter, it is doubtful that any jury charge, no matter how detailed and narrowly focused, could obviate the need for judicial excessiveness review. For one thing, "jury researchers are nearly unanimous in giving the jury poor marks for its understanding of legal instructions." Hans, *The Jury's Response to Business and Corporate Wrongdoing*, 52 Law & Contemp. Probs. 177, 185 (1989) (footnote omitted).[24] And even a jury that understands its

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supporting the imposition of *liability*, and that appellate courts may review the jury instructions. But an unjustly high damages award plainly cannot be rectified by post-verdict consideration of those wholly distinct questions.

[24] The evidence is overwhelming that juries often simply do not understand instructions. See, *e.g.*, V. Hans & N. Vidmar, *Judging the Jury* 120-127 (1986); Brodeur, *The University of Chicago Jury Project*, 38 Neb. L. Rev. 744 (1959); Ellis, *supra*, 40 Ala. L. Rev. at 1006-1007; Elwork & Sales, *Jury Instructions*, in *The Psychology of Evidence and Trial Procedure* 280 (S. Kassin & L. Wrightsman eds., 1985); Forston, *Judges's Instructions: A Quantitative Analysis of Jurors' Listening Comprehension*, 18 *Today's Speech* 34 (Nov. 1970); Hans, *supra*, 52 Law & Contemp. Probs. at 185 & n.54 (citing unpublished research); Kessler, *The Social Psychology of Jury Deliberations*, in *The Jury System in America: A Critical Overview* 69, 83 (R. Simon ed., 1975); Steele & Thornburg, *Jury Instructions: A Persistent Failure to*

instructions may fall subject to passion, bias, prejudice, arbitrariness, or (to repeat Blackstone's list) "inexperience in business, incapacity, misapprehension, [and] inattention to circumstances."

Equally as important, the instructions actually given in this case did not serve as a meaningful and effective constraint on the jury's discretion. After being told that the award of punitive damages was "discretionary," the jury was charged that it "shall" consider evidence of five factors: the likelihood that harm would arise from defendants' misconduct; the degree of defendants' awareness of that misconduct; the duration of the misconduct; the defendants' response upon receiving notice that the ATV was defective; and the defendants' financial condition. Pet. App. 23a n.11. The last of these considerations, as we explain above, is likelier to lead a jury astray than to facilitate a proper disposition of the case. As to the others, providing the jury with a brief list of relevant factors hardly eliminates the otherwise substantial risk of erroneous results.

While the jury was told to consider certain factors, it was not instructed whether those considerations were exclusive. It thus was not instructed whether it could take into account, for example, the possibility that Honda would be held liable for the same conduct in other cases (a factor that should not have been considered in setting an appropriate penalty); on the other hand, it was not told to *disregard* Honda's status as a foreign-owned company (a factor that was not properly considered). The jury was not told how to weigh the considerations it was given or how to balance them against one another. And, of course, the jurors could not be given expertise in assessing punishments and setting appropriate levels of deterrence. Thus, as one commentator recently

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Communicate, 67 N.C.L. Rev. 77, 80 (1988). For anecdotal examples, see Kalven, *supra*, 19 Ohio St. L.J. at 162-163.

noted, "[e]ven if some factors [given to the jury as bearing on the punitive damages calculation] are questions of pure fact" — and most of the considerations given to the jury in this case were not —

> the calculation of punitive damages cannot be said to be fact-dependent or meaningfully guided by a standard. Multi-factor approaches to the calculation of punitive damages typically allow the decisionmaker to decide for itself the relative importance of individual factors and to consider other factors as well. The decisionmaker then makes a highly discretionary determination from a wide range of choices.

Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 Geo. Wash. L. Rev. 723, 802 (1993). The risk of aberrational results accordingly is too high in the absence of meaningful judicial excessiveness review.

3. *The State's Interest.* Finally, the state's interest in preserving the existing scheme is insubstantial. Oregon already provides for post-trial and appellate review of certain issues (such as sufficiency of the evidence to establish liability) in damages cases, in the course of which courts necessarily familiarize themselves with the record; the added cost of providing excessiveness review would be insignificant. Cf. *James Daniel Good Real Property*, slip op. at 15 (requested procedure "creates no significant administrative burden" because "[n]o extra hearing would be required in the typical case"). Indeed, the fact that *no* other State denies excessiveness review is a powerful indication that the administrative costs of providing such review are not particularly heavy. See *Ake* v. *Oklahoma*, 470 U.S. 68, 78 (1985); *Santosky* v. *Kramer*, 455 U.S. 745, 767 (1982) (noting that

35 states provide requested safeguard).[25] Providing judicial excessiveness review therefore "would reduce factual error without imposing substantial fiscal burdens upon the State." *Ibid.*

That conclusion is dispositive, because "it is difficult to identify any interest of the State, other than in its economy, that weighs against recognition of" providing excessiveness review. *Ake*, 470 U.S. at 79. Oregon certainly has "no substantial interest in securing for plaintiffs * * * gratuitous awards of money damages far in excess of any actual injury." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). See *Haslip*, 499 U.S. at 59 (O'Connor, J., dissenting). In fact, the "avowed purpose of [Article VII, Section 3 of the Oregon Constitution] was to bring about an improved administration of justice by reducing retrials to a minimum and so diminishing delay and expense," a goal it achieved by means of "a drastic abridgment of the statutory power of circuit judges to grant new trials." Lusk, *supra*, 35 Or. L. Rev. at 3. In other words, Oregon has achieved economy through the simple expedient of declining to correct erroneous deprivations of property ordered by juries. As has been noted in a related setting, this means of achieving efficiency "is the very essence of arbitrary state action." *Logan*, 455 U.S. at 442 (opinion of Blackmun, J.).

Moreover, any state interest in economy must "necessarily [be] tempered by [the State's] interest in * * * fair and accurate adjudication[s]." *Ake*, 470 U.S. at 79. Cf. *Loudermill*, 470 U.S. at 544 (noting state's interest in not causing wrongful deprivations of property). A failure to

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[25] It bears noting that Oregon courts themselves routinely provide excessiveness review in cases arising under federal statutes, such as the Jones Act and the Federal Employers Liability Act. See, *e.g.*, *Staples* v. *Union Pacific R.R.*, 508 P.2d 426, 427 (Or. 1973).

correct excessive awards also imposes other societal costs. It is well-documented, for example, that the imposition of arbitrary and excessive punishments deters socially beneficial behavior and leads to serious misallocations of resources. See, *e.g.*, *Browning-Ferris*, 492 U.S. at 282-283 (O'Connor, J., concurring in part and dissenting in part); II American Law Institute, Reporters' Study, *Enterprise Responsibility for Personal Injury: Approaches to Legal and Institutional Change* 234 (1991). And uncertainty about the likely size of punitive (and, for that matter, compensatory) awards — an uncertainty that would be greatly compounded by the elimination of the tempering effects of judicial review — will discourage the settlement of litigation by making it impossible for the parties to place a "value" on any particular lawsuit. See Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 56-57 (1982). The failure to provide judicial excessiveness review therefore cannot be justified on utilitarian grounds.

Each of the *Mathews* considerations thus militates in favor of providing such review. The private interest is substantial. The likelihood of jury error is large, as is the corrective value of judicial oversight. And Oregon's interest in maintaining its current system is minimal. In such circumstances, the State's existing approach cannot stand.

C. The Decision Below Cannot Be Squared With *TXO* And *Haslip*.

While the Oregon system's departure from historical practice and failure of the *Mathews* test should dispose of this case, it may be added that there is nothing novel in Honda's contention that judicial excessiveness review is constitutionally required. To the contrary, this Court's decisions in *Haslip* and *TXO* plainly were premised on the understanding that such review is mandated by the Due Process Clause.

In *Haslip*, the Court held that the common law method of imposing punitive damages generally, and Alabama's system in particular, satisfy at least the minimum requirements of due process. The Court expressly recognized that judicial review of the size of punitive judgments is an essential component of the common law method:

> Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.

499 U.S. at 15. In rejecting the procedural due process challenge to Alabama's system, the Court accordingly emphasized the significance of judicial review, observing that Alabama trial courts are required to conduct a post-verdict hearing for purposes of assessing the reasonableness of punitive damages verdicts and that the Alabama Supreme Court subsequently conducts its own review of such exactions, applying a multi-factor test. *Id.* at 20-22. Indeed, the Court took pains to contrast the "detailed" review conducted by Alabama courts with the considerably more limited "passion, bias and prejudice" review available in some state systems, which had caused Justices concern in earlier cases. *Id.* at 21 & n.10. See also *id.* at 40 (Kennedy, J., concurring) ("[e]lements of whim and caprice do not predominate when the jury reaches a consensus based upon arguments of counsel, the presentation of evidence, and instructions from the trial judge, *subject to review by the trial and appellate courts*") (emphasis added).

The decision in *Haslip* has been generally understood to require post-verdict (and appellate) review of jury damages awards. The three Justices who expressly addressed the issue in *TXO* understood "*Haslip* [to] promise[] that, even if juries

occasionally fail[] to fulfill their function faithfully, trial and appellate courts [will] provide meaningful review sufficient to discern impermissible influences and guarantee constitutional results." 113 S. Ct. at 2742 (O'Connor, J., dissenting). In addition, with the exception of the one below, every state court to reach the question has concluded that *Haslip* requires judicial excessiveness review.[26] Indeed, some of the foremost advocates of the plaintiffs' side in the current punitive damages debate told the Court in *TXO* that "post-trial reductions and reversals are a critical part of the procedural reforms mandated by *Haslip* and, therefore, are an essential part of understanding the judicial checks on awards of punitive damages." Brief of amicus curiae University Scholars and Law Professors in Support of Respondents 26-27.

This understanding is confirmed by the decision in *TXO*, where every Member of the Court, explicitly or implicitly, recognized that judicial excessiveness review is

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[26] See, *e.g.*, *Adams* v. *Murakami*, 813 P.2d 1348, 1356 (Cal. 1991) ("At a minimum * * * the high court has made clear [in *Haslip*] a constitutional mandate for meaningful judicial scrutiny of punitive damages awards"); *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897, 907-910 (W. Va. 1991) ("dictates of *Haslip*" require "a meaningful and adequate review by the trial court using established procedures; and [] a meaningful and adequate appellate review"); *Alexander & Alexander*, 596 A.2d at 709-710 (appellate review necessary under *Haslip*); *Herman* v. *Sunshine Chemical Specialties, Inc.*, 627 A.2d 1081, 1085-1086 (N.J. 1993) ("At a minimum, due process requires appellate review of the award for reasonableness" under *Haslip* and *TXO*); *Kinard* v. *Crosby*, 433 S.E.2d 835, 839 (S.C. 1993) (post-verdict and appellate review necessary under *Haslip*). See also *Mattison* v. *Dallas Carrier Corp.*, 947 F.2d 95, 105-106 (4th Cir. 1991). Cf. *Hodges* v. *S.C. Toof & Co.*, 833 S.W.2d 896, 902 (Tenn. 1992) (requiring under state law that trial judges review damage awards and set forth reasons for decision).

constitutionally required. In rejecting arguments for "heightened" judicial scrutiny of a punitive award, a plurality of three Justices (Stevens, J., joined by Rehnquist, C.J. and Blackmun, J.) found it crucial that, among other things, the award was "reviewed and upheld by the trial judge who also heard the testimony, and it was affirmed" on appeal; it was because the judgment was "the product of that process" that it was "entitled to a strong presumption of validity." 113 S. Ct. at 2719-2720. In addition, that plurality of three, joined by Justice Kennedy, examined the *quality* of the post-verdict review in the course of rejecting the argument that the review provided had been constitutionally inadequate. See *id.* at 2724. Significantly, the plurality did not suggest that review is simply unnecessary.[27]

The remaining five members of the Court were explicit on the point. Justice Scalia (joined by Justice Thomas) concluded that "'procedural due process' requires judicial review of punitive damages awards for reasonableness," emphasizing that "*judicial* assessment of [the damages'] reasonableness is a federal right." 113 S. Ct. at 2727 (emphasis in original). Justice Scalia added that "[p]rocedural due process also requires, I am certain, * * * judicial review of the reasonableness of jury-awarded compensatory damages (including damages for pain and suffering)." *Ibid.* And as noted above, the dissenters (Justice O'Connor, joined in full by Justice White and in relevant part by Justice Souter) were of the view that "trial and appellate

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[27] We note in this regard that the dissenting Justices understood the plurality opinion to accept the proposition that judicial review is required, although they took issue with the plurality's conclusion that the review provided by the West Virginia courts was adequate. See 113 S. Ct. at 2742 (O'Connor, J., dissenting) (under the plurality's approach, "courts now may disregard the post-trial review required by due process at whim or will, so long as they do not deny its necessity openly or altogether").

courts [sh]ould provide meaningful review." 113 S. Ct. at 2742. *Haslip* and *TXO* thus confirm what traditional due process considerations indicate: due process requires meaningful judicial review of the size of punitive (and, at least implicitly, compensatory) awards.

CONCLUSION

The decision of the Supreme Court of Oregon should be reversed.

Respectfully submitted.

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APPENDICES

APPENDIX A

In the following fifty-one cases reported on Westlaw as decided in 1992 and 1993, remittiturs were granted or affirmed based on the excessiveness of the jury verdict. *Dunn* v. *Hovic*, 1 F.3d 1371 (CA 3) (en banc) (reducing punitive damages award of $2 million, which had been reduced by trial court from $25 million, to $1 million), modified in part, 13 F.3d 58 (CA 3), cert. denied, 114 S. Ct. 650 (1993); *King* v. *Macri*, 993 F.2d 294 (CA 2 1993) (remitting puntive damages award of $250,000 to $150,000); *Keenan* v. *City of Philadelphia*, 983 F.2d 459 (CA 3 1992) (affirming remittiturs with respect to three of four defendants); *Ross* v. *Black & Decker, Inc.*, 977 F.2d 1178 (CA 7 1992) (remitting $10 million punitive damages award to $5 million), cert. denied, 113 S. Ct. (1993); *Vasbinder* v. *Scott*, 976 F.2d 118 (CA 2 1992) (reducing $150,000 awards against each defendant to $30,000 and $20,000); *Phelan* v. *Local 305 of United Ass'n of Journeymen & Apprentices of Plumbing and Pipefitting Indus.*, 973 F.2d 1050 (CA 2 1992) (affirming remittitur but remanding because of magistrate's failure to offer plaintiff option of a new trial), cert. denied, 113 S. Ct. 1415 (1993); *Brown* v. *Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (CA 11 1992) (trial court remitted $10 million jury award to $2 million; remittitur not challenged on appeal), cert. denied, 113 S. Ct. 2992 (1993); *Hill* v. *Marshall*, 962 F.2d 1209 (CA 6 1992) (reversing remittitur of entire punitive damages award, but remanding with directions to approve an amount of punitive damages reasonably supported by the evidence); *Ash* v. *Georgia-Pacific Corp.*, 957 F.2d 432 (CA 7 1992) (affirming reduction of $2.5 million to $500,000); *Hutchinson* v. *Stuckey*, 952 F.2d 1418 (CA D.C. 1992) (remanding for retrial on the basis of excessiveness of compensatory and puntive damages); *Jeffries* v. *Harleston*, 828 F. Supp. 1066 (S.D.N.Y. 1993) (reducing puntive damages award of $320,000 to $280,000); *Darby* v. *Heather Ridge*, 827 F. Supp. 1296 (E.D. Mich. 1993) (remitting punitive damages

award of $250,000 to $50,000); *Mitchell* v. *Globe Int'l Publishing, Inc.*, 817 F. Supp. 72 (W.D. Ark. 1993) (remitting $850,000 punitive damages award to $350,000 on remand from court of appeals for remittitur), appeal dismissed (CA 3 May 3, 1993); *Enstar Group, Inc.* v. *Grassgreen*, 812 F. Supp. 1562 (M.D. Ala. 1993) (remittitur of $18 million puntive damages award to $10 million); *Purgess* v. *Sharrock*, 1993 WL 328919 (S.D.N.Y. 1993) (unreported) (remitting $4.6 million punitive damages award to $500,000); *Moretto* v. *G & W Elec. Co.*, 1993 WL 127951 (S.D.N.Y. 1993) (unreported) (remittitur of $3,720,979 punitive damages award to $2,265,420); *Defender Indus.* v. *Northwestern Mutual Life Ins. Co.*, 809 F. Supp. 400 (D.S.C. 1992) (remittitur of $25 million to $5 million), aff'd, 989 F.2d 492 (CA 4 1993); *Chronicle Pub. Co.* v. *Legrand*, 1992 WL 420808 (N.D. Cal. 1992) (unreported) (vacating $1,275,000 punitive damages award on grounds of excessiveness); *Ebeling & Reuss, Ltd.* v. *Swarovski Int'l Trading Corp., A.G.*, 1992 WL 211554 (E.D. Pa. 1992) (unreported) (remitting $21.5 million to $16.5 million); *Reserve Nat'l Ins. Co.* v. *Crowell*, 614 So. 2d 1005 (Ala.) (affirming remittitur of $1 million puntive damages award to $600,000), cert. denied, 114 S. Ct. 84 (1993); *BMW of North America, Inc.* v. *Gore*, 1993 WL 460233 (Ala. 1993) (per curiam) (unreported) (remittitur of half of $4 million punitive damages award); *Northwestern Mutual Life Ins. Co.* v. *Sheridan*, 1993 WL 453023 (Ala. 1993) (unreported) (remittitur of half of $24,927,248 punitive damages award); *Big B, Inc.* v. *Cottingham*, 1993 WL 341132 (Ala. 1993) (unreported) (remitting $1 million puntive damages award to $600,000); *Joe Cooper & Assocs., Inc.* v. *Central Life Assurance Co.*, 614 So. 2d 982 (Ala. 1992) (trial court remitted $2 million punitive damages award to $300,000; not challenged on appeal); *Intercontinental Life Ins. Co.* v. *Lindblom*, 598 So. 2d 886 (Ala.) (remitting award totalling more than $3 million, including punitive damages, to $1 million), cert. denied, 113 S. Ct. 200 (1992); *General Motors*

Corp. v. *Johnston*, 592 So. 2d 1054 (Ala. 1992) (Reducing $15 million punitive damages award by half); *Herrick* v. *Quality Hotels, Inns & Resorts, Inc.*, 24 Cal. Rptr. 2d 203 (Cal. Ct. App. 1993) (affirming reduction of $150,000 punitive damages award by half); *Harris* v. *Hughes Aircraft Co.*, 23 Cal. Rptr. 2d 343 (Cal. Ct. App. 1993) (affirming remittitur of $3.5 million punitive damages award to $975,000); *Hilgedick* v. *Koehring Fin. Corp.*, 8 Cal. Rptr. 2d 76 (Cal. Ct. App. 1992) (ordering remittiturs of $5 million punitive damages award to $1,628,466 and $2.5 million punitive damages award to $160,440), review dismissed (Cal. July 15, 1993); *Wollersheim* v. *Church of Scientology of California*, 6 Cal. Rptr. 2d 532 (Cal. Ct. App. 1992) (unspecified punitive damages award remitted to $2 million), review dismissed (Cal. July 15, 1993); *Keohane* v. *Wilkerson*, 859 P.2d 291 (Colo. Ct. App. 1993) (affirming remittitur of $5000 punitive damages award to $2500); *Concors Supply Co.* v. *Giesecke Int'l, Ltd.*, 1992 WL 91151 (Del. Super. Ct.) (unreported) (punitive damages awards of $500,000 against each of two defendants remitted to $125,000 each), aff'd 618 A.2d 90 (Del. 1992); *Girsberger* v. *Kresz*, 1993 WL 533825 (Ill. App. Ct. 1993) (unreported) (affirming remmititur of $392,000 punitive damages award to $289,028 and $184,000 punitive damages award to $50,000); *Wedmore* v. *Jordan Motors, Inc.*, 589 N.E.2d 1180 (Ind. Ct. App. 1992) (affirming trial court remittitur of $400,000 punitive damages award to $20,000); *Jordan* v. *Intercontinental Bulktank Corp.*, 621 So. 2d 1141 (La. Ct. App. 1993) (reducing $1 million punitive damages award by half), cert. denied 114 S. Ct. 926 (1994); *Fraidin* v. *Weitzman*, 611 A.2d 1046 (Md. Ct. App. 1992) (holding $3 million punitive damages award excessive and remanding to trial court for reconsideration of remittitur); *Rosenbloom* v. *Flygare*, 501 N.W.2d 597 (Minn. 1993) (reducing $65,000 punitive damages award to $30,000); *Mrozka* v. *Archdiocese of St. Paul & Minneapolis*, 482 N.W.2d 806 (Minn. Ct. App. 1992) (affirming remittitur of $2.7 million punitive damages award

to $187,000); *Dees* v. *American Nat'l Fire Ins. Co.*, 861 P.2d 141 (Mont. 1993) (affirming reduction of punitive damages award from $575,000 to $300,000); *Papa* v. *City of New York*, 598 N.Y.S.2d 558 (N.Y. App. Div. 1993) (reducing $2.5 million punitive damages award to $1 million); *Hart* v. *City of New York*, 588 N.Y.S.2d 1012 (N.Y. App. Div. 1992) (affirming remittitur of $250,000 punitive damages award to $100,000); *Rossignol* v. *Silvernail*, 586 N.Y.S.2d 343 (N.Y. App. Div. 1992) (affirming remittitur of $75,000 punitive damages award to $15,000); *Parkin* v. *Cornell University, Inc.*, 581 N.Y.S.2d 914 (N.Y. App. Div. 1992) (reducing $100,000 punitive damages award to $10,000); *Herald* v. *Hood*, 1993 WL 277541 (Ohio Ct. App. 1993) (unreported) (affirming reduction of $5 million punitive damages award to $2.5 million); *Scribner* v. *Hillcrest Medical Ctr.*, 1992 WL 551143 (Okla. Ct. App. 1992) (ordering remittitur of half of $10 million dollar punitive damages award or new trial), cert. denied, 114 S. Ct. 288 (1993); *Reccko* v. *Criss Cadillac Co.*, 610 A.2d 542 (R.I. 1992) (reducing $50,000 punitive damages award to $25,000); *Weir* v. *Citicorp Nat'l Servs., Inc.*, 435 S.E.2d 864 (S.C. 1993) (affirming remittitur of $500,000 punitive damages award to $275,000); *Simerly* v. *Edwards*, 1992 WL 62010 (Tenn. Ct. App. 1992) (unreported) (trial court granted remittitur of $6625 punitive damages award to $4,125; not challenged on appeal); *Texas Farmers Ins. Co.* v. *Soriano*, 844 S.W.2d 808 (Tex. Ct. App. 1992) (reducing $5 million punitive damages award to $1 million); *Wal-Mart Stores, Inc.* v. *Berry*, 833 S.W.2d 587 (Tex. Ct. App. 1992) (affirming reduction of $200,000 punitive damages award to $100,000); *Nash* v. *Dotseth*, 1993 WL 3630 (Wis. Ct. App. 1993) (unreported) (affirming reduction of punitive damages award from $15,000 to $2,000).

APPENDIX B

In the following one hundred thirty cases reported on Westlaw as decided in 1992 and 1993, awards of punitive damages were held not excessive. *Loughman* v. *Consol-Pennsylvania Coal Co.*, 6 F.3d 88 (CA 3 1993); *Rodick* v. *City of Schenectady*, 1 F.3d 1341 (CA 2 1993); *Capstick* v. *Allstate Ins. Co.*, 998 F.2d 810 (CA 10 1993); *Kienitzy* v. *McDonnell Douglas Corp.*, 990 F.2d 1051 (CA 8 1993); *Lynch* v. *Bryant*, 1993 WL 20141 (CA 6 1993) (unreported); *Robertson Oil Co.* v. *Phillips Petroleum Co.*, 1993 WL 532709 (CA 8 1993) (unreported); *Massey* v. *Farmers Ins. Group*, 1993 WL 34770 (CA 10) (unreported), cert. denied, 113 S. Ct. 2345 (1993); *Hafner* v. *Brown*, 983 F.2d 570 (CA 4 1992); *Benny M. Estes & Assocs., Inc.* v. *Time Ins. Co.*, 980 F.2d 1228 (CA 8. 1992); *Latham Seed* v. *Nickerson Am. Plant Breeders, Inc.*, 978 F.2d 1493 (CA 8 1992), cert. denied, 113 S. Ct. 3037 (1993); *Peoples Bank & Trust Co.* v. *Globe Int'l Pub., Inc.*, 978 F.2d 1065 (CA 8 1992); *Ingram* v. *Acands, Inc.*, 977 F.2d 1332 (CA 9 1992); *Campbell* v. *Bartlett*, 975 F.2d 1569 (CA 10 1992); *Finley* v. *Empiregas, Inc.*, 975 F.2d 467 (CA 8 1992); *Broadcort Capital Corp.* v. *Summa Medical Corp.*, 972 F.2d 1183 (CA 10 1992); *Jordan* v. *Clayton Brokerage Co.*, 975 F.2d 539 (CA 8 1992), cert. denied, 113 S. Ct. 1272 (1993); *Brown* v. *Petrolite Corp.*, 965 F.2d 38 (CA 5 1992); *Stephens, Inc.* v. *Geldermann, Inc.*, 962 F.2d 808 (CA 8 1992); *Hardin, Rodriguez & Boivin Anesthesiologists, Ltd.* v. *Paradigm Ins. Co.*, 962 F.2d 628 (CA 7 1992); *Hygh* v. *Jacobs*, 961 F.2d 359 (CA 2 1992); *Bogan* v. *Stroud*, 958 F.2d 180 (CA 7 1992); *Wallace* v. *Mullholland*, 957 F.2d 333 (CA 7 1992); *Scheidt* v. *Klein*, 956 F.2d 963 (CA 10 1992); *Littlefield* v. *McGuffey*, 954 F.2d 1337 (CA 7 1992); *Hebron Pub. School Dist. No. 13* v. *U.S. Gypsum*, 953 F.2d 398 (CA 8 1992); *Barnwell* v. *Barber-Colman Co.*, 1992 WL 6013 (CA 4 1992) (unreported); *Hosseini* v. *Chowdry*, 1992 WL 16746 (CA 9

1992) (unreported); *In re Hawaii Federal Asbestos Cases*, 1992 WL 78092 (CA 9 1992) (unreported); *Nutri-Metics Int'l, Inc.* v. *Carrington Labs., Inc.*, 1992 WL 389246 (CA 9 1992) (unreported); *Maharis* v. *Omaha Vaccine Co.*, 1992 WL 133117 (CA 9 1992) (unreported); *Winters* v. *Union Tex. Petroleum Corp.*, 1992 WL 208171 (CA 10 1992) (unreported); *Bergeson* v. *Dilworth*, 1992 WL 64887 (CA 10 1992) (unreported); *Alberty* v. *Tyson Foods, Inc.*, 1992 WL 401599 (CA 10 1992) (unreported); *Troutt* v. *Charcoal Steak House, Inc.*, 835 F. Supp. 899 (W.D. Va. 1993); *In re Guam Asbestos Litig.*, 1993 WL 470426 (D. Guam 1993) (unreported); *Midland Management Corp.* v. *Computer Consoles, Inc.*, 1993 WL 69624 (N.D. Ill. 1993) (unreported); *Continental Trend Resources* v. *Oxy USA, Inc.*, 810 F. Supp. 1520 (W.D. Okla. 1992); *Bishop* v. *Mid-America Auto Auction, Inc.*, 807 F. Supp. 683 (D. Kan. 1992); *McCann* v. *Ruiz*, 802 F. Supp. 606 (D.P.R. 1992); *Weathers* v. *American Family Mutual Ins. Co.*, 793 F. Supp. 1002 (D. Kan. 1992); *Laughinghouse* v. *Risser*, 786 F. Supp. 920 (D. Kan. 1992); *Fenstermacher* v. *Telelect, Inc.*, 1992 WL 175114 (D. Kan. 1992) (unreported); *Lozier Corp.* v. *Gray*, 634 So. 2d 1034 (Ala. 1993); *Henderson* v. *Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993); *Phillips Colleges of Alabama, Inc.* v. *Lester*, 622 So. 2d 308 (Ala. 1993); *King Motor Co.* v. *Wilson*, 612 So. 2d 1153 (Ala. 1992); *Continental Eagle Corp.* v. *Mokrzycki*, 611 So. 2d 313 (Ala. 1992); *Atkins* v. *Lee*, 603 So. 2d 937 (Ala. 1992); *Empire Gas, Inc. of Belle Mina* v. *Cartwright*, 595 So. 2d 1348 (Ala. 1992); *Union Mortgage Co.* v. *Barlow*, 595 So. 2d 1335 (Ala.), cert. denied, 113 S. Ct. 301 (1992); *Allstate Ins. Co.* v. *Hilley*, 595 So. 2d 873 (Ala. 1992); *Smith* v. *States General Ins. Co.*, 592 So. 2d 1021 (Ala. 1992); *Cameron* v. *Beard*, 864 P.2d 538 (Alaska 1993); *Cater* v. *Cater*, 846 S.W.2d 173 (Ark. 1993); *Wheeler Motor Co.* v. *Roth*, 867 S.W.2d 446 (Ark. 1993); *Warhurst* v. *White*, 838 S.W.2d 350 (Ark. 1992); *Viking Ins. Co. of Wisconsin* v. *Jester*, 836

S.W.2d 371 (Ark. 1992); *Interstate Freeway Servs., Inc.* v. *Houser*, 835 S.W.2d 872 (Ark. 1992); *B & F Engineering, Inc.* v. *Cotroneo*, 830 S.W.2d 835 (Ark. 1992); *Cronk* v. *Intermountain Rural Elec. Ass'n*, 1992 WL 161811 (Colo. Ct. App. 1992) (unreported); *Schnabel* v. *Tyler*, 630 A.2d 1361 (Conn. Ct. App. 1993); *Mack Trucks, Inc.* v. *Conkle*, 436 S.E.2d 635 (Ga. 1993); *Oglethorpe Power Corp.* v. *Sheriff*, 436 S.E.2d 14 (Ga. Ct. App. 1993); *Clarke* v. *Cotton*, 429 S.E.2d 291 (Ga. Ct. App. 1993); *Cuddy Mountain Concrete, Inc.* v. *Citadel Constr., Inc.*, 824 P.2d 151 (Idaho 1992); *E.J. McKernan Co.* v. *Gregory*, 623 N.E.2d 981 (Ill. App. Ct. 1993); *Jerry Clark Equip., Inc.* v. *Harris*, 612 N.E.2d 858 (Ill. App. Ct. 1993); *Kochan* v. *Owens-Corning Fiberglass Corp.*, 610 N.E.2d 683 (Ill. App. Ct. 1993); *Marek* v. *Stepkowski*, 608 N.E.2d 285 (Ill. App. Ct. 1992); *Verdonck* v. *Scopes*, 590 N.E.2d 545 (Ill. App. Ct. 1992); *Hockenberg Equip. Co.* v. *Hockenberg's Equip. & Supply Co.*, 1993 WL 533870 (Iowa 1993) (unreported); *Nassen* v. *National States Ins. Co.*, 494 N.W.2d 231 (Iowa 1992), cert. denied, 113 S. Ct. 1846; *Hanson* v. *American Nat'l Bank & Trust Co.*, 865 S.W.2d 302 (Ky. 1993); *Sutton's Truck Parts, Inc.* v. *Roy*, 594 So. 2d 1375 (La. Ct. App. 1992); *Haworth* v. *Feigon*, 623 A.2d 150 (Me. 1993); *Market Tavern, Inc.* v. *Bowen*, 610 A.2d 295 (Md. Ct. Spec. App. 1992); *Hanks* v. *Hubbard Broadcasting, Inc.*, 493 N.W.2d 302 (Minn. Ct. App. 1992); *C & C Trucking Co.* v. *Smith*, 612 So. 2d 1092 (Miss. 1992); *Carpenter* v. *Chrysler Corp.*, 853 S.W.2d 346 (Mo. Ct. App. 1993); *Green* v. *Miller*, 851 S.W.2d 553 (Mo. Ct. App. 1993); *Horn* v. *Village Supermarkets, Inc.*, 615 A.2d 663 (N.J. Super. Ct. App. Div. 1992); *Rozwell* v. *Philanz Oldsmobile, Inc.*, 591 N.Y.S.2d 649 (N.Y. App. Div. 1992); *Chlystun* v. *kent*, 586 N.Y.S.2d 410 (N.Y. App. Div. 1992); *Lovell* v. *Nationwide Mutual Ins. Co.*, 424 S.E.2d 181 (N.C. Ct. App. 1993); *Juarez-Martinez* v. *Deans*, 424 S.E.2d 154 (N.C. Ct. App. 1993); *Maintenance Equip. Co.* v. *Godley Builders*, 420 S.E.2d 199 (N.C. Ct. App.

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APPENDIX C

In the following ninety cases reported on Westlaw as having been decided in 1992 and 1993, jury awards of punitive damages have been reversed, remitted, or remanded for reconsideration on grounds other than excessiveness. *Koester* v. *American Republic Invs., Inc.*, 11 F.3d 818 (CA 8 1993) (insufficient evidence to support award of punitive damages); *Europlast, Ltd.* v. *Oak Switch Sys., Inc.*, 10 F.3d 1266 (CA 7 1993) (insufficient evidence to support puntive damages award); *Burke* v. *Deere & Co.*, 6 F.3d 497 (CA 8 1993) (insufficient evidence to support puntive damages award), cert. denied, 1993 WL 547871 (1994); *Toole* v. *McClintock*, 999 F.2d 1430 (CA 11 1993) (insufficient evidence to support puntivie damages award); *Morgan* v. *Woessner*, 997 F.2d 1244 (CA 9 1993) (punitive damages award remanded to district court for constitutional review), cert. dismissed, 114 S. Ct. 671 (1994); *Drabik* v. *Stanley-Bostitch, Inc.*, 997 F.2d 496 (CA 8 1993) (insufficient evidence to support award of punitive damages); *Trandes Corp.* v. *Guy F. Atkinson Co.*, 996 F.2d 655 (CA 4) (remitting punitive damages in accordance with statutory cap on punitive damages), cert. denied, 114 S. Ct. 443 (1993); *Packard* v. *Provident Nat'l Bank*, 994 F.2d 1039 (CA 3) (punitive damages not available as a matter of law), cert. denied, 114 S. Ct. 440 (1993); *Bierle* v. *Liberty Mutual Ins. Co.*, 992 F.2d 873 (CA 8 1993) (punitive damages vacated on j.n.o.v.); *Manildra Milling Corp.* v. *Ogilvie Mills, Inc.*, 1993 WL 217173 (CA Fed. 1993) (insufficient evidence of underlying tort claims); *Keenan* v. *City of Philadelphia*, 983 F.2d 459 (CA 3 1992) (insufficient evidence to support award of punitive damages against one of four defendants); *Wackenhut Applied Technologies Ctr., Inc.* v. *Sygnetron Protection Sys., Inc.*, 979 F.2d 980 (CA 4 1992) (remitting award to comport with Virginia's statutory damages cap); *Eaton* v. *Newport Bd. of Educ.*, 975 F.2d 292 (CA 6 1992) (reversing and vacating judgment on first amendment

grounds), cert. denied, 113 S. Ct. 2459 (1993); *Johnson* v. *Hugo's Skateway*, 974 F.2d 1408 (CA 4 1992) (vacating and remanding for new trial based on improper jury instructions); *Brown* v. *Petrolite Corp.*, 965 F.2d 38 (CA 5 1992) (one punitive damages award vacated because of insufficient actual damages to support punitive damages award); *Advanced Medical, Inc.* v. *Arden Medical Sys., Inc.*, 955 F.2d 188 (CA 3 1992) (setting aside punitive damages award because liability must be retried); *American Computech, Inc.* v. *National Medical Care, Inc.*, 1992 WL 66641 (CA 9 1992) (unreported) (instructional error); *Fleet Nat'l Bank* v. *Anchor Media Television*, 831 F. Supp. 16 (D.R.I. 1993) (insufficient evidence to support punitive damages award); *U.S. E.E.O.C.* v. *AIC Sec. Investigations, Ltd.*, 823 F. Supp. 571 (N.D. Ill. 1993) (reducing total puntiive damages award of $500,000 to $150,000 to conform to statutory damages cap); *Pacific Group* v. *First State Ins. Co.*, 1993 WL 540942 (N.D. Cal. 1993) (unreported) (vacating award of punitive damages on j.m.o.l); *Lightning Lube, Inc.* v. *Witco Corp.*, 802 F. Supp. 1180 (D.N.J. 1992) (granting j.m.o.l. on punitive damages award), aff'd, 4 F.3d 1153 (CA 3 1993); *Cain* v. *Armstrong World Indus.*, 785 F. Supp. 1448 (S.D. Ala. 1992) (compensatory damages award so excessive as to suggest entire verdict tainted); *Jacobs Mfg. Co.* v. *Sam Brown Co.*, 792 F. Supp. 1520 (W.D. Mo. 1992) (judgment reversed in its entirety); *Ebeling & Reuss, Ltd.* v. *Swarovski Int'l Trading Corp.*, 1992 WL 211554 (E.D. Pa. 1992) (part of award remitted as duplicative); *Grimes* v. *Stewart*, 628 So. 2d 467 (Ala. 1993) (insufficient evidence to support punitive damages); *Clarke-Mobile Counties Gas Dist.* v. *Reeves*, 628 So. 2d 368 (Ala. 1993) (judgment reversed in its entirety); *Delchamps, Inc.* v. *Morgan*, 601 So. 2d 442 (Ala. 1992) (insufficient evidence to support punitive damages award); *Melancon* v. *USAA Casualty Ins. Co.*, 849 P.2d 1374 (Ariz. Ct. App. 1992) (reversing punitive damages award on instructional error); *Rhue* v. *Dawson*, 841 P.2d 215 (Ariz. Ct. App. 1992) (remanding for trial court to consider whether

punitive damages award is excessive when considered together with large compensatory damages award); *Arkansas Kraft* v. *Cottrell*, 855 S.W.2d 333 (Ark. 1993) (reversing entire judgment because there was no evidence to support the underlying negligence claim); *Dillard Dept. Stores, Inc.* v. *Adams*, 867 S.W.2d 442 (Ark. 1993) (insufficient evidence to support punitive damages); *Tricou* v. *ACI Management, Inc.*, 823 S.W.2d 924 (Ark. Ct. App. 1992) (insufficient evidence to support punitive damages awward); *Nola M.* v. *University of Southern California*, 20 Cal. Rptr. 2d 97 (Cal. Ct. App. 1993) (reversing underlying claim); *Kenly* v. *Ukegawa*, 19 Cal. Rptr. 2d 771 (Cal. Ct. App. 1993) (reversing punitive damages award because it was not based on evidence of defendant's wealth); *Andrea N.* v. *Laurelwood Convalescent Hosp.*, 16 Cal. Rptr. 894 (Cal. Ct. App. 1993) (appeal of j.n.o.v. on punitive damages) *Jackson* v. *Johnson*, 7 Cal. Rptr. 2d 482 (Cal. Ct. App. 1992) (insufficient evidence to support punitive damages award); *Burgess* v. *Mid-Century Ins. Co.*, 841 P.2d 325 (Colo. Ct. App. 1992) (reducing punitive damages award to comport with statutory allowance of treble damages); *White* v. *Hansen*, 837 P.2d 1229 (Colo. 1992) (punitive damages vacated on j.n.o.v. because plaintiff was 50% at fault); *Lira* v. *Davis*, 832 P.2d 240 (Colo. 1992) (reducing punitive damages award after reducing compensatory damages award for comparative negligence to conform to statute prohibiting awards of punitive damages from exceeding awards of compensatory damages); *Calbert* v. *Volkswagen of America, Inc.*, 1993 WL 478079 (Del. Super. Ct. 1993) (affirming grant of j.n.o.v. on punitive damages); *Peninsula Fed. Sav. & Loan Ass'n* v. *DKH Properties, Ltd.*, 616 So. 2d 1070 (Fla. Ct. App. 1993) (judgment reversed in entirety); *Georgia Ports Auth.* v. *Hutchinson*, 434 S.E.2d 791 (Ga. Ct. App. 1993) (punitive damages award held void as against public policy); *J.B. Hunt Transp., Inc.* v. *Bentley*, 427 S.E.2d 499 (Ga. Ct. App. 1992) (insufficient evidence to exceed punitive damages cap; awards reduced accordingly); *Adams* v. *Krueger*, 856 P.2d

864 (Idaho 1993) (reversing for insufficient evidence to support underlying claim); *Curtis* v. *Firth*, 850 P.2d 749 (Idaho 1993) (punitive damages award remanded for trial court to make findings of fact concerning excessiveness); *Kennan* v. *Checker Taxi Co.*, 620 N.E.2d 1208 (Ill. App. Ct. 1993) (insufficient evidence to support punitive damages); *Homewood Fishing Club* v. *Archer Daniels Midland Co.*, 605 N.E.2d 1140 (Ill. App. Ct. 1992) (insufficient evidence to support punitive damages); *Abshire* v. *Stoller*, 601 N.E.2d 1257 (Ill. App. Ct. 1992) (reversing punitive damages against one defendant as a matter of law); *Kritzen* v. *Flender Corp.*, 589 N.E.2d 909 (Ill. App. Ct. 1992) (insufficient evidence to support punitive damages award); *Barnes* v. *Barnes*, 603 N.E.2d 1337 (Ind. 1992) (remanding for new trial on underlying liability claims); *Beeman* v. *Manville Corp. Asbestos Disease Compensation Fund*, 496 N.W.2d 247 (Iowa 1993) (appeal of j.n.o.v. on punitive damages); *Gillespie* v. *Seymour*, 853 P.2d 692 (Kan. 1993) (reversing because trial court failed to make findings of fact sufficient to afford meaningful appellate review); *Caldor, Inc.* v. *Bowden*, 625 A.2d 959 (Md. 1993) (remanding punitive damages because there may not have been actual damages); *Medical Mutual Liab. Ins. Soc'y of Maryland* v. *B. Dixon Evander & Assocs., Inc.*, 609 A.2d 353 (Md. Ct. Spec. App. 1992) (vacating puntive damages award and remanding for full consideration of whether award is excessive as constitutionally required); *Owens-Illinois, Inc.* v. *Armstrong*, 604 A.2d 47 (Md.) (reversing punitive damages on basis of instructional error), cert. denied, 113 S. Ct. 204 (1992); *Bougie* v. *Sibley Manor, Inc.*, 504 N.W.2d 493 (Minn. Ct. App. 1993) (reversing punitive damages for failure of trial court to make statutory findings); *Illinois Cent. R. Co.* v. *White*, 610 So. 2d 308 (Miss. 1992) (affirming grant of j.n.o.v. on punitive damages award); *Finkelberg* v. *Luckett*, 608 So. 2d 1214 (Miss. 1992) (insufficient evidence to support punitive damages award); *Strothkamp* v. *Chesebrough-Pond's, Inc.*, 1993 WL 79239 (Mo. Ct. App. 1993) (appeal of j.n.o.v. on punitive

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Fed. Credit Union v. *Phillips*, 855 P.2d 1146 (Or. Ct. App. 1993) (holding that punitive damages were precluded as a matter of law); *Foggie* v. *CSX Transp., Inc.*, 431 S.E.2d 587 (S.C. 1993) (reversing punitive damages as precluded by statute); *Pullen* v. *Textron*, 845 S.W.2d 777 (Tenn. Ct. App. 1992) (remanding punitive damages claim for new trial under newly announced principles of punitive damages liability); *Sasser* v. *Averitt Express, Inc.*, 839 S.W.2d 422 (Tenn. Ct. App. 1992) (remanding punitive damages claim for new trial under newly announced principles of punitive damages liability); *Hodges* v. *S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992) (vacating entire judgment and announcing new standards for punitive damages awards); *Ward* v. *Terminix Int'l. Inc.*, 1992 WL 227405 (Tenn. 1992) (unreported) (remanding punitive damages claim for new trial under newly announced principles of punitive damages liability); *Missouri Pacific R.R. Co.* v. *Lemon*, 861 S.W.2d 501 (Tex. Ct. App. 1993) (reducing punitive damages award under statute limiting such awards to four times survival recovery); *Phar-Mor, Inc.* v. *Chavira*, 853 S.W.2d 710 (Tex. Ct. App. 1993) (insufficient evidence to support punitive damages); *General Chem. Corp.* v. *De La Lastra*, 852 S.W.2d 916 (Tex.) (reducing punitive damages award under statute limiting such awards to four times survival recovery), cert. dismissed 114 S. Ct. 490 (1993); *Wal-Mart Stores, Inc.* v. *Alexander*, 1993 WL 502513 (Tex. 1993) (unreported) (insufficient evidence to support punitive damages); *Schindler* v. *Austwell Farmers Coop.*, 841 S.W.2d 853 (Tex. 1992) (insufficient evidence of underlying claim which supported punitive damages award); *Transportation Ins. Co.* v. *Archer*, 832 S.W.2d 403 (Tex. Ct. App. 1992) (reversed for legally erroneous basis of claim); *Circle Y of Yoakum* v. *Blevins*, 826 S.W.2d 753 (Tex. Ct. App. 1992) (reversing and remanding for new trial on basis of improper argument); *Marina Shores, Ltd.* v. *Cohn-Phillips, Ltd.*, 435 S.E.2d 136 (Va. 1993) (reversing judgment in its entirety); *Tazewell Oil Co.* v. *United Virginia Bank/Crestar Bank*, 413 S.E.2d 611 (Va. 1992) (affirming

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QUESTION PRESENTED

Whether Oregon's system of judicial review of facts found by juries violates procedural due process.

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

A. Introduction

According to Honda, it is the victim of a "freakish" Oregon procedural system, one that provides "no check on juries" and gives them "unreviewable authority" over damages verdicts. Brief of Petitioners ("Pet. Br.") at 11. In Honda's view, Oregon law left it helpless against a jury that was "bedazzled" by its wealth, "bias[ed]" against its Japanese ownership, and inadequately instructed by the trial judge. *Id.* at 25, 26, 32. This story has no basis in fact.

Honda has not accurately described the full extent of judicial oversight of compensatory and punitive damage awards in Oregon. In addition to providing comprehensive pre-verdict protections, Oregon law does *not* deny judicial review of the size of damages verdicts. Indeed, such review was available to Honda and was afforded in this very case. In the end, Honda can support only the limited point that Oregon courts will not inquire into whether a damages award is "'excessive or in any other respect opposed to the weight of the evidence.'" Pet. Br. 3 (quoting *Van Lom v. Schneiderman*, 210 P.2d 461, 465 (Or. 1949)). That is, the "excessiveness" review so highly lauded by Honda is merely a species of weight-of-the-evidence review.

But there can be no constitutional right to such a particular form of review. The question before this Court is ultimately whether a punitive damage award violates the Due Process Clause merely because a judge, based on his or her personal view of the weight of the evidence, would conclude that the award is "excessive," even though there is judicial review to ensure that the award: (1) was imposed by a jury whose discretion was narrowly confined by a plethora of procedural safeguards; (2) satisfied federal substantive due process; (3) was imposed in a fair proceeding free of any kind of legal error; (4) was not the product of passion or prejudice; and (5) was supported by substantial evidence. The answer is self-evident.

B. Procedural History of this Case

Honda's failure to address the available procedural protections in Oregon law is quite surprising in light of the fact that Honda enjoyed many of them in the courts below, and those that it did not

invoke were nonetheless available to it. Honda was willing to accept the benefits of Oregon procedure until this Court's decision in *Pacific Mutual Life Ins. Co.v. Haslip*, 499 U.S. 1 (1991); after that decision was announced — when this case was on appeal — Honda apparently recognized the strategic value of caricaturing the Oregon system as one that denies judicial review of punitive damages awards altogether. But the procedural history of this case belies Honda's current claims.

1. The Parties' Claims and the Jury's Verdict

In 1985, while respondent Karl Oberg was driving one of Honda's three-wheel all-terrain vehicles ("ATVs") up a steep hill, the 325-pound vehicle suddenly flipped over backwards on him. It crushed many of the bones in his face and skull, causing serious permanent injuries. Oberg filed suit, alleging among other things that the vehicle had flipped due to its inherently dangerous design, that Honda was aware of the dangers, and that Honda nevertheless had promoted the vehicle as safe and failed to warn consumers of the grave dangers posed by ordinary operation of the vehicles.

A notice of proposed rulemaking by the Consumer Product Safety Commission cited the "performance characteristics" of ATVs like Honda's as a "significant factor" in a staggering record of injuries: more than 68,000 accidents requiring emergency room visits in 1984 alone, and at least 161 deaths in the three years prior to Oberg's 1985 accident. Pet. App. 67a-68a. The CPSC viewed "the ever widening knowledge of fatal incidents," and the many severe injuries, as "alarming and ominous," and as constituting perhaps "one of the most significant and explosively growing product hazards ever considered by this agency." Pet. App. 65a. The evidence indicated that Honda had marketed in excess of a million ATVs over more than a decade despite actual knowledge of such risks and that Honda had deliberately refused to make scientific tests of safety, to make needed safety improvements of known design flaws, to warn of these dangers, or to recall vehicles that were deceptively unstable and therefore inherently dangerous. *See* note 29, *infra*.

Honda's defense at trial was that its ATVs were reasonably safe for their intended purpose and that the accident was all Oberg's fault. Although Honda acknowledged that it had promoted the ATV

model that Oberg was driving as the "King of the Hill," Honda attacked Oberg as reckless for accepting the opportunity to ride the new model up a short, steep hill. Tr. 3:52. In Honda's view, its vehicles were perfectly safe and it was the riders of the vehicles who were at fault for the tens of thousands of injuries occurring each year. *See, e.g.*, Tr. 3:72-78; Tr. 18:1866-1947; Tr. 25:2864-81. Thus, Honda argued that this case simply involved "a rider who misjudged the technique and misjudged his own ability" to ride up the hill. Tr. 3:91.

Oberg was required by Oregon rules to specify in his complaint the maximum amount of punitive damages he would seek at trial. ORCP 18B. Before and during trial,[1] Honda repeatedly moved to dismiss Oberg's punitive damages claim — arguing, for example, that the evidence did not support any punitive damages at all — but it elected not to include an argument in the alternative that the evidence did not support an award of $5 million. In arguments to the jury Honda pursued a strategy of focusing solely on liability and declining to suggest a dollar figure for punitive damages counter to Oberg's request for a $5 million award.[2] Oberg was not allowed

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[1] Honda moved pre-trial to dismiss Oberg's claim for punitive damages. Motion of April 4, 1989. At the end of plaintiff's evidence and again at the close of all evidence, Honda reasserted its objections to the punitive damages claim. The trial court ruled: "I will deny that motion on [the constitutional] ground, and also on the lack of evidence ground." Tr. 23:2728.

[2] Contrary to the suggestion that Oberg made a naked appeal to Honda's wealth in arguing the proper amount of punitive damages, *see* Pet. Br. at 4, 24-25, Oberg's argument was narrowly focused on the amount that would be necessary to deter a corporation of Honda's size from similar actions endangering the public in the future. Argument centered on the "need to make an example" of the wrongdoer, and the fact that "there are no criminal remedies that apply in a case like this," because "[y]ou can't put a corporation in jail," which is "really why we have punitive damages." Tr. 24:2836-37. Honda was described as "stubborn and inert" in failing to remedy the dangers it knew it was imposing on the public, and the jury was told: "Clearly someone needs to get their attention. History and common sense teach us that corporations respond to money. . . . Getting Honda's attention is a large part of what you're here for." Tr. 24:2838. It was in this reasoned, restrained context that Oberg noted that Honda's stipulated net worth was $4.9 billion, and suggested that 1/10th of 1 percent of that sum was necessary to "[g]et[] Honda's attention." *Id.*

Notably, Honda *never objected* to this line of argument and, in fact, attempted to rebut Oberg's argument on its own terms. *E.g.*, Tr. 25:2875

to introduce evidence regarding Honda's financial condition until he "presented evidence sufficient to justify . . . a prima facie claim of punitive damages." ORS 41.315(2). After this had been done, Honda stipulated that the jury should be told that, in setting punitive damages, it must take into account Honda's net worth of $4.9 billion.[3]

The trial judge gave the jury the extensive instructions that are required by Oregon law in product liability actions. *See* Pet. App. 23a n.11.[4] The jury was told that punitive damages could be

("[D]o you have Honda's attention? Yes, you do. Do you need to send a message to Japan? You have the inventor who came in and addressed you, to give his side and to explain it.").

[3] At trial, Honda waived the argument it now attempts to raise that "a *corporate* defendant's wealth has no rational connection to the setting of an appropriate penalty." Pet. Br. at 25 n.17 (emphasis in original). In fact, Honda explicitly approved a stipulation concerning the total wealth represented by all of Honda's lines of business, prepared by Oberg, which Honda said was "acceptable as is," and which informed the jury: "If witnesses were called, the evidence would establish that the net worth of the defendant Honda companies is $4.9 billion." Tr. 23:2703. This was duly read to the jury. *Id.* Later, Honda chose not to object to the jury charge instructing the jury to take into account this stipulated wealth figure in setting punitive damages. Tr. 25:2959-60.

[4] ORS 30.925 provides:

(1) In a product liability civil action, punitive damages shall not be recoverable unless it is proven by clear and convincing evidence that the party against whom punitive damages is sought has shown wanton disregard for the health, safety and welfare of others.

(2) During the course of trial, evidence of the defendant's ability to pay shall not be admitted unless and until the party entitled to recover establishes a prima facie right to recover under subsection (1) of this section.

(3) Punitive damages, if any, shall be determined and awarded based upon the following criteria:

(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;

(b) The degree of the defendant's awareness of that likelihood;

(c) The profitability of the defendant's misconduct;

(d) The duration of the misconduct and any concealment of it;

awarded only if Oberg made out his claim by "clear and convincing evidence." *Id.* Despite its current view that "the instructions actually given in this case did not serve as a meaningful and effective constraint on the jury's discretion," Pet. Br. at 32, at trial Honda made *no constitutional objection of any kind* to *any* of the instructions governing the jury's determination of punitive damages; rather, it simply reiterated its "blame the rider" position that it had done nothing wrong and that the jury should not be allowed even to consider the issue of punitive damages.[5]

Honda acquiesced in the jury charge stating that "the amount of general damages may not exceed the sum of $900,000" and that "the amount of punitive damages may not exceed the sum of $5 million." Tr. 25:2942, 2944. Honda did not ask the judge to put smaller caps on the amounts the jury could award. Nor did Honda seek a special verdict form that would have required the jury to specify its findings with respect to the relevant statutory criteria on

(e) The attitude and conduct of the defendant upon discovery of the misconduct;

(f) The financial condition of the defendant; and

(g) The total deterrent effect of other punishment imposed on the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.

[5] Honda excepted to the jury instructions at trial as follows:

> With the exception, or aside from, or I should say in addition to the statutory to the written instructions, *to be consistent with our position on punitives, I want to except to the court's giving any instruction on that* . . . .

Tr. 25:2959 (emphasis added). Further, Honda expressly waived the right it enjoyed under Oregon law to an instruction referring to "[t]he total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damages awards to persons in situations similar to the plaintiff's." ORS 30.925(3)(g). The case at bar was the first time in which punitive damages were imposed on Honda for the misconduct in question, and Honda argued to the trial court that such an instruction "is, under the current state of the evidence, not applicable." Appendix A to Oberg Ore. Sup. Ct. Br., filed Dec. 31, 1991, at App-2. That statement disposes of Honda's current complaint that the jury "was not instructed whether it could take into account, for example, the possibility that Honda would be held liable for the same conduct in other cases." Pet. Br. 32.

damages embodied in the jury instructions.

Although the twelve-person jury did not accept Honda's sweeping "blame the rider" defense completely, it did find some fault on both sides; it found Oberg 20 percent at fault for the accident and Honda 80 percent at fault. As compensation for Oberg's medical expenses, lost earnings and pain and suffering, the jury awarded $919,390.39, reduced to $735,512.31 in light of Oberg's partial fault.[6] The jury also found that Honda was guilty of wanton misconduct and that a punitive damages award of $5 million was necessary to deter similar misconduct by Honda and others in the future.

2. The Trial Court's Rulings on Honda's Post-Verdict Attacks on the Size of the Damages Awards

In its post-trial motions, Honda invoked three different standards under Oregon law for reviewing the size of damages verdicts: (a) a passion-or-prejudice test, (b) a "substantial evidence" test, and (c) a weight-of-the-evidence standard.

(a) Passion-or-Prejudice Review

Honda argued for a new trial on the ground that:

> The jury's verdict is clearly the product of passion and prejudice. The damages awarded bear no relationship to plaintiff's actual damages or defendants' conduct. Rather, defendants believe that the jury's awards simply reflect unfair prejudices inflamed by improper testimony such as references to dissimilar accidents, to alleged age discrimination, and to the cessation of sales of three-wheel ATVs.

Honda New Trial Mot., filed May 25, 1989, at 54-55. Honda contended that such judicial review of the level of "damages awarded" was "wholly consistent with the spirit of the 'no evidence' clause of the Oregon Constitution." *Id.* at 54. Honda emphasized to the trial court that Oberg did "not dispute that *this Court possesses the power to order a new trial for excessive damages* appearing to have been given under the influence of passion or prejudice." Honda New Trial Reply, filed June 22, 1989, at 24-25 (emphasis added).

In its passion-or-prejudice argument, Honda did not claim that the jury was motivated by xenophobia, or by a bias against Honda's wealth.[7] Rather, Honda relied entirely upon the evidentiary

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[6] Of the $919,390.39 in compensatory damages, the jury awarded $900,000 in general damages, the maximum allowed under the jury instructions, and $19,390.39, the stipulated medical expenses. In its award of general damages, the jury rejected the figures suggested by both Oberg and Honda. Oberg suggested that the jury should award $50 per day for Oberg's life expectancy of 49 years, or $882,000. Tr. 24:2835-36. Honda's counsel confided that "I'm not always good at picking a reasonable number," but suggested that "more than $50,000 in damages to Mr. Oberg would be enrichment and not compensation." Tr. 25:2890. At no time did Honda make an argument to the jury, or introduce evidence to support its present suggestion that the award should not have exceeded approximately $300,000, because this sum could have generated $50 per day in interest, the amount mentioned by Oberg's counsel, if invested in 30-year treasury bonds (ignoring, of course, the problem of inflation during the next 30 years). Pet. Br. at 6 n.3.

[7] Any post-trial complaint about the jury's consideration of Honda's wealth would have been frivolous: Honda failed to object to the relevant instruction, stipulated to the jury's being told of its net worth, and failed to object to Oberg's closing argument suggesting that the jury award 1/10th of 1 percent of Honda's net worth as punitive damages. See notes 2, 3 & 5, *supra*.

Any claim of xenophobia likewise would have been insupportable. Honda now complains that the jury "was not told to *disregard* Honda's status as a foreign-owned company." Pet. Br. at 32. But Honda never asked for such an instruction. See note 5, *supra*. The protections on this score that it *did* ask for were granted: at the voir dire stage, a 14-page Jury Questionnaire drafted largely by Honda inquired into prospective jurors' attitudes toward Honda products (Question 33), into ownership of Japanese automobiles (Question 35), into whether the jurors had visited Japan (Question 36) and into the jurors' "opinions, one way or the other, as to whether Japanese-manufactured products should be sold in American markets." One *amicus* brief filed in support of Honda asserts that in this case "the jury was reminded that the manufacturer was a Japanese corporation," Br. of Product Liability Advisory Council, *et al.*, at 14, but no citation to any argument by *Oberg's counsel* is provided (it was Honda's counsel who injected the issue into his closing argument, saying that there was no "need to send a message to Japan" because the ATV's inventor had travelled from Japan to testify, *see* Tr. 25:2875).

The same *amicus* brief argues that plaintiff's counsel described Oberg as "'a red-blooded 20 year old American boy,'" and asserts that "[t]here can be little doubt as to the intended insinuation." *Id.* at 14 (quoting Tr. 24:2807). But as lines 6 to 24 of the quoted page make abundantly clear, there was no attempt to contrast the plaintiff's nationality with Honda's foreign ownership.

admission of supposedly "improper testimony," *id.* at 54: (1) evidence that was upheld by the Oregon Supreme Court as properly admitted, which Honda does not here challenge;[8] (2) evidence produced by Honda itself on its cross-examination of one of its former employees;[9] and (3) evidence produced by Oberg without

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Rather, Oberg's counsel was arguing that Honda had marketed an inherently dangerous product that was "seductive" to the target consumer group: "It makes you want to get on it. A red-blooded 20-year old American boy can't resist it, especially if he's a motorcycle nut." Tr. 24:2807.

Beyond the lack of support for Honda's complaints on this record, Oregon law in general provides thorough jury selection procedures to screen out any elements of prejudice or bias among potential jurors. At voir dire, each party is permitted to question prospective jurors extensively. ORCP 57C. Biased jurors may be excused for cause. ORCP 57D(1); *State v. Montez*, 789 P.2d 1352, 1360-72 (Or. 1990). Each party also has three peremptory challenges to remove jurors whom it feels could not fairly judge the case. ORCP 57D(2). Oregon law requires new trials if there is evidence of jury misconduct or irregularity. ORCP 64B(1), (2). Moreover, Oregon law prohibits arguments by counsel having "a tendency to incite the hostility of the jury against an opposing party." *Devine v. Southern Pacific Co.*, 295 P.2d 201, 208 (Or. 1956). Oregon courts have made clear that, given timely objection, they will take appropriate steps to cure appeals to jury bias, including issuing curative instructions, declaring mistrials, or granting new trials. *Oregon v. Montgomery Ward Development Corp.*, 719 P.2d 507, 515-16 (Or. App. 1986).

[8] Honda claimed that there were improper "references to dissimilar accidents," Honda New Trial Mot. at 54-55 — namely, the extensive documentary proof that Honda was on notice from the Consumer Product Safety Commission that ATVs were causing scores of deaths and thousands of grave injuries. The Oregon intermediate appellate court rejected this argument (Pet. App. at 75a-78a) as did the Oregon Supreme Court (Pet. App. at 3a-8a), and Honda does not press the matter in this Court.

[9] Honda claimed that it was prejudiced by improper references to "alleged age discrimination." Honda New Trial Mot. at 55. In fact, the problem was one of Honda's own creation. On cross-examination of one of its former employees, called by Oberg to testify about safety problems in Honda's ATVs, Honda sought to elicit information about how the witness's employment had terminated, hoping to discredit the witness by showing that he had been fired for poor performance. The witness disagreed, stating: "I was fired because of my age." Tr. at 5:485. He further stated that he filed suit and that "Honda admitted they were wrong and settled with me." Tr. 5:488. Honda never introduced evidence to contradict these statements. In its new trial motion Honda raised this incident as legal error requiring a new trial independent of the amount of damages. *See* Honda New Trial Mot. at 36-37. The argument was rejected, and Honda did not raise the point on appeal.

objection after Honda's cross-examination opened the door and created the need for a response.[10]

Oberg argued in reply that neither the compensatory award nor the punitive damages award was the product of passion or prejudice: (a) Regarding the compensatory award, Oberg maintained that the "medical evidence clearly established that [he] suffers from permanent life-altering inner-ear damage, facial damage, and cognitive damage." Oberg New Trial Response, filed June 12, 1989, at 45. He pointed out that Honda had introduced no evidence at all to rebut this showing of severe permanent harm. *Id.*

(b) On the punitive award, Oberg argued that overwhelming evidence in the record demonstrated that Honda had "acted wantonly and recklessly in its course of conduct of testing, designing and marketing unreasonably unsafe products." *Id.* at 45-46. Significantly, Oberg also pointed out that Honda had failed to offer any quantitative alternative to his suggestion that a punitive damages award equivalent to 1/10th of 1 percent of Honda's net worth — that is, an award of $5 million — would be needed to deter Honda and other companies from similar wrongdoing in the future. *Id.*

Moreover, the theory that the jury was swept away by prejudice against Honda flies in the face of the jury's verdict *against* Oberg, finding him partially negligent and requiring that his recoverable compensatory damages be reduced by 20 percent.

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[10] Honda claimed that it was prejudiced by improper references "to the cessation of sales of three-wheel ATVs" after Oberg's accident, Honda New Trial Mot. at 55, something that Honda had worked throughout the trial to prevent the jury from learning. Honda tripped itself up by seeking to discredit one of Oberg's experts on vehicle safety, who stated that the vehicle that had injured Oberg was defective because its design did not utilize a "rollover system" to protect the driver's head from being crushed by the vehicle. Honda sought to discredit the expert by pointing out that he had never designed a rollover system for a three-wheel ATV. Tr. at 23:2588. To rebut the suggested inference that the expert was inexperienced in the field, Oberg properly elicited on cross-examination the reason the expert had never done the design: the "[v]ehicles are no longer manufactured, and I haven't been asked to." Tr. at 23:2595. In its new trial motion Honda raised this incident as legal error requiring a new trial independent of the amount of damages. *See* New Trial Mot. at 16-18. The argument was rejected, and Honda dropped the point on appeal.

(b) Sufficiency-of-the-Evidence Review for "Substantial Evidence"

In its motion for judgment n.o.v., Honda contended that "a judgment for defendants notwithstanding the verdict should now be entered on the grounds that there was no substantial evidence to support the jury's findings of either liability or damages. Plaintiff's evidence was insufficient . . . to prove that plaintiff was injured in the sum of $919,390.30 or to prove punitive damages in the sum of $5,000,000." Honda JNOV Mot., filed May 25, 1989, at 3. Honda also sought a new trial on the ground that "[t]he jury's damages award is excessive in amount and mandates a new trial as . . . the jury's verdict is not supported by the evidence." Honda New Trial Mot. at 3.[11] Honda cited the Oregon Supreme Court's decision in *Van Lom v. Schneiderman*, 210 P.2d 461 (1949), but noted that *Van Lom* "divested both Oregon trial courts and its appellate courts of their common law power to set aside excessive jury verdicts, *except in cases where there exists no evidence supporting the verdict*." Honda New Trial Mot. at 48 (emphasis added). Honda argued that a new trial would be available under Oregon law, "[w]hatever [legal] standard is applied." *Id.* at 53.

(c) Weight-of-the-Evidence Review

Finally, in its new trial motion Honda urged the trial court to adopt a more "equitable" interpretation of *Van Lom*, which Honda said prevented Oregon courts from granting new trials where "the jury's verdict is excessive and against the clear weight of the evidence." Honda New Trial Mot. at 49, 50. Honda thus recognized that *Van Lom* relates specifically and exclusively to weight-of-the-evidence review.

This argument, along with Honda's sufficiency-of-the-evidence and passion-or-prejudice contentions, was denied by the trial court in a written order, with no indication that it believed that sufficiency

[11] Honda contended, for example, that "neither the jury's compensatory damage award nor its punitive damage award has any reasonable relationship to plaintiff's actual damages," *i.e.*, Oberg's $19,390.39 in medical expenses. Honda New Trial Mot. at 50-51. In support of this claim, Honda made detailed factual arguments concerning the nature of Oberg's medical care, injuries, employment history and pain and suffering. *Id.* at 51-52.

or passion-or-prejudice review were unavailable under Oregon law — or that Honda had misread *Van Lom*. The court did not elaborate its reasons for decision, perhaps because Honda did not ask it to do so.

3. The Appellate Opinions Rejecting Honda's Request for Weight-of-the-Evidence Review of "Excessiveness"

On appeal, Honda urged the Oregon Court of Appeals to reverse the trial court's judgment and remand for a new trial. Honda maintained that *Van Lom* did not preclude either passion-or-prejudice or sufficiency-of-the-evidence challenges to the size of the damages award. Honda argued that "*Van Lom* left open the question of whether Article VII, § 3, affected the trial court's power to grant a new trial for excessive damages appearing to have been given under the influence of passion and prejudice." Honda Ct. App. Br., filed Aug. 1, 1990, at 41. Indeed, Honda contended that "*Van Lom* suggested that the size of the verdict alone might be sufficient" to indicate passion and prejudice. *Id.* at 41 n.29. In addition, Honda reprised its "substantial evidence" argument.[12]

The court of appeals did not hold that either passion-and-prejudice or sufficiency review is unavailable under Oregon law. In fact, the court explained that, although Article VII, § 3 "prohibits trial and appellate courts from setting aside a verdict on the ground that it is excessive," that constitutional provision "does allow appellate review of a punitive damages award to determine whether there is any evidence to support the verdict." Pet. App. 86a-87a. "The combined effect of the restrictions on jury discretion mandated by ORS 30.925 *and appellate review* ensures that the fact finder be guided by more than a defendant's financial condition and that there be a rational relationship between the *amount of the award* and what is necessary for deterrence." *Id.* at 87a (emphasis added).

[12] Honda contended that "*Van Lom* held that Article VII, § 3 prevented Oregon's courts from setting aside excessive jury verdicts, except where no evidence exists to support the verdict," Honda Ct. App. Br. at 40, and Honda maintained that, "[w]hatever standard is applied, both the compensatory and punitive awards [here] are excessive and unsupported by evidence." *Id.* at 43. For example, Honda argued that Oberg "offered no significant evidence that he would require future medical care"; that he "also failed to prove that he will lose any wages as a result of the accident"; and that he "presented no evidence to support an award of $900,000.00 for future non-economic loss." *Id.* at 42.

Nor did the Oregon Supreme Court hold that either passion-or-prejudice or sufficiency review is unavailable under Oregon law. Instead, the state supreme court explained that "a fact decided by a jury may be re-examined when a reviewing court can say affirmatively that there is no evidence to support the jury's decision." Pet. App. 27a. In this case, the court found that "there was evidence to support [the jury's] determination." *Id.* at 33a. The court observed that "[d]efendants do not claim that the trial court failed to instruct the jury concerning the statutory criteria or that the jury did not properly apply those criteria." *Id.* at 22a n.11. Accordingly, the Oregon Supreme Court affirmed the judgment.

SUMMARY OF ARGUMENT

The compensatory damage award must be affirmed because Honda waived any challenge to it below.[13]

[13] As Oberg explained in his Opposition to *Certiorari* at 2, 10, Honda did not assert that the compensatory award violated due process until it sought discretionary review in the Supreme Court of Oregon. As Honda admits, that court did not pass on the tardy challenge. Pet. Br. at 8. *See Waller v. Rocky Mountain Fire & Cas. Co.*, 535 P.2d 530, 536 (Or. 1975); *State v. Hickmann*, 540 P.2d 1406, 1407 (Or. 1975); *Smith Kline & French Labs. v. State Tax Comm'n*, 403 P.2d 375, 378 n.1 (Or. 1965). It is well settled that "it will be presumed that the omission was due to want of proper presentation in the State courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983). Honda has made no attempt to make this showing, or to comply with Supreme Court Rule 14(h). There is obviously nothing to Honda's excuse that it "could not present [the procedural due process] claim [as to compensatory damages] until after . . . the trial court declined to review the compensatory award." Honda Reply Br. in Support of *Cert.* at 7. That does not remotely explain Honda's failure to present this claim to the intermediate appellate court.

Honda suggests that, rather than concluding "that the Oregon Supreme Court's failure to expressly address the compensatory award constitutes an implicit holding of waiver," it would be "far more sensible to understand the Oregon Supreme Court's silence as constituting a recognition that separate discussion of compensatory damages was unnecessary: if punitive awards are unreviewable, *a fortiori* so are compensatory awards." *Id.* at 8 n.9. This speculative assertion falls far short of the requisite affirmative showing. Even if compensatory damages might logically be swept within the ambit of Honda's legal principle, that would not excuse the need for a specific challenge to the compensatory award.

The punitive damage award should also be affirmed.

I. The proceedings in this case clearly complied with this Court's decisions in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), and *TXO Production Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711 (1993).

A. As a totality, the Oregon punitive damages system plainly comports with due process. Oregon law provides extensive pre-verdict constraints on jury discretion: a requirement that plaintiffs plead a specific amount of punitive damages in their complaint, which becomes a ceiling that the jury cannot exceed; a standard of clear-and-convincing evidence for the imposition of punitive damages; extensive statutory criteria that give the jury detailed guidance as to the factors it is to consider; and a prohibition on the admission of evidence relating to a defendant's wealth until punitive liability is established. Punitive damages are proportionately *lower* under the Oregon system of pre-verdict safeguards than in other States. Honda's argument that judicial review according to a weight-of-the-evidence standard is nonetheless required flies in the face of centuries of deference to the jury and raises deep and troubling questions about the validity of capital punishment laws, jury sentencing schemes, and federal and state administrative agencies.

B. In the end, this Court need not resolve the constitutional question posed by Honda's position, because Oregon provides ample judicial review of punitive damage awards to ensure that they: (1) are consistent with federal substantive due process; (2) are not infected with legal error, such as incorrect jury instructions, admission of inflammatory evidence, or improper appeals to the jury; (3) are not the product of passion or prejudice; and (4) are supported by substantial evidence. Honda's effort to package this case as one involving the total denial of judicial review is insupportable.

II. Honda's claim that weight-of-the-evidence excessiveness review is mandated by history and the test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), is severely flawed.

A. As noted legal historians explain in an *amicus* brief supporting respondent, Honda has its history precisely backwards. At common law, jury assessment of damage awards — particularly in tort and punitive damages cases — was well-nigh final. There is no tradition of weight-of-the-evidence excessiveness review.

B. This Court has never used the *Mathews* test to evaluate an institution so historically established and so deeply entrenched in American life as the jury. Further, even assuming that the test is appropriate here, Honda cannot meet it. Honda presumes that Oregon provides no judicial review of punitive damage awards at all; this premise is utterly false. In addition, it is settled that there is no constitutional right to the kind of weight-of-the-evidence review that Honda seeks. Honda's claim that such review is necessary to check jury decisions is based on a tendentious reading of social science evidence, unwarranted optimism regarding judicial competence, and a fundamental misunderstanding of the role of the representative jury in making inherently value-laden judgments about the appropriate amounts of punitive damages. Moreover, Honda's interest — money damages — is relatively minor, while Oregon's interests — affirmance of the importance of the jury and reduction of unnecessary new trials — are enormous.

C. The provision of the Oregon Constitution attacked in this case, Article VII, § 3, applies not just to punitive damage awards, but to *all* factual issues in all civil and criminal proceedings in Oregon. If this Court were to accept Honda's argument, there would be no principled means of limiting the decision to the punitive damages context. For example, the current preference in many jurisdictions of allowing weight-of-the-evidence review (under Fed. R. Civ. P. 59(a) and Fed. R. Crim. P. 33 and similar state rules) would become a matter of constitutional right — thus granting all civil litigants and all criminal defendants a permanent due process right to at least one new trial whenever trial or appellate judges believe that the jury's verdict is against *the weight of the evidence*, even though *sufficient evidence* concededly exists to support the verdict and all other procedural protections have been satisfied. Every criminal conviction now pending on direct review from Oregon, and from the eight other States which do not provide weight-of-the-evidence review, would have to be vacated and remanded for judicial review according to Honda's new standard.

The Due Process Clause does not require such absurd results. The system of judicial review practiced in Oregon since 1910 clearly comports with due process.

ARGUMENT

I. THE DECISION BELOW COMPLIES WITH *HASLIP* AND *TXO*

Honda brings a *procedural*, rather than *substantive*, due process challenge to the judgment below. "Honda is not pressing a federal substantive due process argument in this Court; rather, the contention is that the denial of any excessiveness review in the Oregon courts deprived Honda of *procedural* protections to which it is entitled." Reply Br. in Support of *Cert.* at 2 (emphasis in original). Honda's claim is apparently that the money it would otherwise pay in damages is "property" protected by the Fourteenth Amendment. Pet. Br. at 19 n.13.[14]

But Honda and its *amici* disagree over the "process" that is "due" as a matter of the Fourteenth Amendment. Honda asserts a right to judicial review of whether a damage award is against the weight of the evidence under the "state-law standards governing the entitlement to compensatory damages and the imposition of punitive damages" — "standards that ordinarily would be more precise or exacting in various particulars than whatever comparatively modest limitations may be imposed on damages by substantive due process. Accordingly, the first line of inquiry would be whether the verdict is excessive *under standards imposed by state law*." Pet. Br. at 3 (emphasis added).

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[14] There would be no basis whatsoever for supposing that state-created substantive limits on damage awards by juries constitute "entitle[ments]", Reply Br. in Support of *Cert.* at 2, that carry with them, as a matter of *federal* due process, a *procedural right to judicial review*. Unlike state-created interests in "property" or "liberty," where a faintly similar argument has carried the day as a procedural right to a hearing before some neutral factfinder (*not* necessarily a judge), *see Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 540-41 (1985); *but see id.* at 559-63 (Rehnquist, now C.J., dissenting), state-created limits on jury behavior, like other state rules constraining official conduct in ways beyond those demanded by federal law, are not a species of "liberty" or "property" at all, much less species of liberty or property whose deprivation can be effected only by state *judicial* action. Otherwise, mere state-law violations would automatically become federal constitutional claims. *But see TXO*, 113 at 2721 n.24 (plurality opinion); *Estelle v. McGuire*, 112 S. Ct. 475, 480 (1992); *Snowden v. Hughes*, 321 U.S. 1, 11-12 (1944); *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 520 (1885).

Honda's *amici*, however, would have this Court promulgate its own constitutional standard of "excessiveness" mirroring the "reasonableness" test that both *Haslip* and *TXO* used as the touchstone of the *substantive due process* inquiry. *See* 113 S. Ct. at 2720 (plurality opinion); 499 U.S. at 18.[15] The *amici* propose, as part of this new "excessiveness" test, various "objective indicia" identified in *TXO* as bearing on the *substantive* due process inquiry. 113 S. Ct. at 2718-23 (plurality) In effect, the *amici* would simply recast "the 'substantive due process' argument . . . in 'procedural due process' terms." *Reno v. Flores*, 113 S. Ct. 1439, 1450 (1993).[16]

There is no warrant for using procedural due process to construct a novel and vague constitutional "excessiveness" test out of whole cloth, as the *amici* suggest, or to create the right to state-law weight-of-the-evidence review that Honda seeks. Even if *Haslip* and *TXO* had not already provided sufficient guidance in the punitive damages area, this case would offer no opportunity for going further.

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[15] *See, e.g.*, Br. of American Council of Life Insurance, *et al.*; Br. of Washington Legal Foundation; Br. of Product Liability Advisory Council, *et al.* Also misguided is the *amicus* brief by CBS, Inc. and other leading media interests which raises concerns about punitive damages awards in defamation cases and argues for special restraints on such awards given the First Amendment values involved. That brief fails to mention that Oregon has been a leader in championing the very points advanced by these *amici*; long ago the Oregon Supreme Court invoked its version of the First Amendment to institute an outright *ban* on punitive damages in defamation actions. *E.g.*, *Hall v. The May Dept. Stores*, 637 P.2d 126, 147 (Or. 1981); *Wheeler v. Green*, 593 P.2d 777, 789 (Or. 1979).

[16] The redundancy between the substantive due process test and the *amici*'s proposed "excessiveness" standard could hardly be otherwise. There could be no reason — aside from the sort of impressionistic decisionmaking that the Due Process Clause does not countenance — for having the "objective indicia" mandated by procedural due process deviate from their counterparts under federal substantive due process.

A. Oregon Law Provides Ample Constraints on Jury Discretion

1. Oregon Provides Extensive Pre-Verdict Procedures

In *Haslip* and *TXO*, this Court made clear that the Due Process Clause does not require States to adopt any specific set of procedures for imposing punitive damages. There is no constitutional blueprint. Rather, the Court indicated that the relevant test is whether a state scheme, *as a totality*, imposes "a sufficiently definite and meaningful constraint" on fact-finder discretion in awarding punitive damages. *Haslip*, 499 U.S. at 22. "As long as the discretion is exercised within reasonable constraints, due process is satisfied." *Id.* at 20.

Honda seizes on one aspect of Oregon's system — the denial of excessiveness review under a weight-of-the-evidence standard.[17] But "it is obvious that a proper due process inquiry cannot be made by focusing upon one narrow provision" of a challenged state scheme. *Santosky v. Kramer*, 455 U.S. 745, 775 (1982) (Rehnquist, now C.J., dissenting). Rather, "[c]ourts must examine *all* procedural protections offered by the State, and must assess the *cumulative* effect of such safeguards." *Id.* (emphasis in original).

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[17] Honda's claim that Oregon stands alone among the States in refusing to provide weight-of-the-evidence excessiveness review is incorrect. *See, e.g.*, Annot., *Excessiveness or Inadequacy of Punitive Damages Awarded in Personal Injury or Death Cases*, 12 ALR 5th 195, 273-75 (1993) (listing 20 States in which "courts have adopted the view that the amount of punitive or exemplary damages awarded in an action involving personal injury or death is left to the sound discretion of the trier of fact, and absent a showing of passion or prejudice such award will not be set aside on the grounds of excessiveness or inadequacy").

Moreover, Honda's claim that all other States "afford[] appellate review of a trial court's denial of a new trial or remittitur," Pet. Br. at 16 n.11 (citing *Dagnello v. Long Island R.R.*, 289 F.2d 797, 798-99 & n.1 (2d Cir. 1961)), reveals a fundamental misunderstanding of what is at issue here. Article VII, § 3 does not concern the power of appellate courts to review the denial of new trial motions by trial judges, but rather the treatment to be accorded facts found by juries. In any event, the traditional rule, which persisted from the framing of the U.S. Constitution until the middle of this century, was that appellate courts did *not* have the power to review the denial of new trial motions by trial courts. *See* note 34, *infra*. The traditional limit on the power of appellate courts has largely eroded, but not because of any suggestion that it violated due process.

Oregon offers extensive pre-verdict protections for defendants, which surpass those of almost every other State. In States where instructions and other trial-level procedures leave juries with broad discretion, judicial review is thought necessary as a remedy to "check" on excessive jury discretion. *Haslip*, 499 U.S. at 20.[18] But the problem of excessive discretion never *arises* in Oregon in the first place.

For example, in this case, Honda enjoyed the right to test the sufficiency of Oberg's proof as to any of his claims (including his claim for punitive damages) at the close of plaintiff's case, again at the close of all evidence, again in its post-trial motion, and again on appeal;[19] the right to raise any asserted legal errors in the trial court and to seek review of all such rulings; and the right to file all the motions that are detailed in the procedural history, pp. 6-12, *supra*.

Further, Honda enjoyed trial-level protections imposing strict limits on jury discretion in awarding punitive damages — stricter than those available in virtually any other State and precisely the sort of pre-verdict prophylactic safeguards that Justice O'Connor advocated in *Haslip*.[20] Partly as a result of a "tort-reform" statute enacted in 1979, Oregon law:

- requires plaintiffs to plead specific amounts in each category of damages and limits the recovery in each category to the sums pleaded, ORCP 18B; Pet. Br. at 5 n.2;

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[18] Ironically, opponents of punitive damages have typically disparaged the ability of judicial review to provide an effective check on jury discretion. *See* note 56, *infra*.

[19] Oregon courts are vigilant in striking punitive damages altogether where punitive liability is not established. *E.g.*, *Badger v. Paulson Investment Co.*, 803 P.2d 1178, 1186-87 (Or. 1991); *Andor v. United Airlines*, 739 P.2d 18, 24-25 (Or. 1987); *Schmidt v. Pine Tree Land Development Co.*, 631 P.2d 1373, 1376 (Or. 1981); *Chamberlain v. Jim Fisher Motors*, 578 P.2d 1225, 1228 (Or. 1978); *Wilson v. Tobiassen*, 777 P.2d 1379, 1383 (Or. App. 1989).

[20] *See* 499 U.S. at 57-59 (O'Connor, J., dissenting) (arguing that state courts should give detailed jury instructions that would "provide [juries] with specific standards to guide their discretion;" urging them to adopt the standard of clear-and-convincing evidence; and concluding that "[d]ue process requires only that a jury be given a measurable degree of guidance, not that it be straitjacketed into performing a particular calculus").

- mandates, in product liability actions such as this one, detailed jury instructions based on extensive statutorily established criteria;
- requires that "a claim for punitive damages shall be established by clear and convincing evidence," ORS 30.925(1), 41.315(1); and
- provides that "evidence of the financial condition of a party shall not be admissible until the party seeking such damages has presented evidence sufficient to justify to the court a prima facie claim of punitive damages." ORS 30.925(2), 41.315(2).

Honda barely mentions these procedural safeguards in its brief, even though they radically transform the posture of its claim. Indeed, so effective are the safeguards from the defendant's perspective that, prior to the verdict in this case, there were no reported punitive damages decisions in product liability cases in all of Oregon during the ten-year life history of the statute.

Although Honda and its *amici* rely heavily on empirical evidence, Pet. Br. at 27-28; WLF Br., they never ask the most obvious question: Are punitive damage awards typically higher in Oregon than in other States? Given the supposed absence of procedural checks in Oregon, one would think that awards would be astronomical there. In fact, the evidence shows that Oregon awards are dramatically *lower* than those in most other States: punitive damages are rarely awarded in products liability actions in Oregon (only twice in 25 years, including the case at bar); the size of the mean punitive damages award in Oregon is less than half that of the national mean; of the 45 States allowing punitive damages, Oregon ranks in the bottom half in both total awards and per capita awards; and the amount of punitive damages awarded per capita in Oregon is less than one-quarter of the amount awarded nationwide. *See* Brief *Amicus Curiae* of Trial Lawyers for Public Justice ("TLPJ Br.").

One conclusion is inescapable that — regardless of the absence of the single, specialized form of review that Honda seeks — the Oregon system as a whole functions remarkably well in restraining overall damage awards. There simply is no reason to tinker with an Oregon system that isn't broken. The Due Process Clause is not some sort of "rigid code of procedural necessities," *Walters v. Nat'l*

Ass'n of Radiation Survivors, 473 U.S. 305, 326 (1985), that automatically requires a weight-of-the-evidence standard for reviewing damages.

2. There is No Constitutional Basis For Honda's Proposed Requirement of Judicial Review of Damage Awards

Honda's position is that no system of pre-verdict constraints, "no matter how detailed and narrowly focused, could obviate the need for judicial excessiveness review" because the jury simply cannot be trusted to follow its instructions. Pet. Br. at 31. But Honda waived this claim below, *see* p. 12, *supra*, and in any event the argument is flawed for reasons discussed in Part II-B, *infra*. Even assuming the correctness of Honda's criticism of the jury, its argument would require this Court to decide an unsettled and far-reaching question of constitutional law.

There is clearly no federal constitutional right to trial by judge. *Beacon Theatres v. Westover*, 359 U.S. 500, 510 (1959) ("the right to jury trial is a constitutional one . . . while no similar requirement protects trials by the court"). Throughout American history due process has never been thought to preclude Congress and the States from vesting final decisionmaking authority over particular issues (especially factual ones) in juries and other non-judicial decisionmakers. "The States are free to allocate functions between judge and jury as they see fit," *Stein v. New York*, 346 U.S. 156, 179 (1943); *Jackson v. Denno*, 378 U.S. 368, 391 n.19 (1964) (no requirement that judge decide "constitutional fact" of voluntariness), or to dispense with judicial methods of dispute resolution altogether. *Hardware Dealers Mut. Fire Ins. Co. v. Glidden*, 284 U.S. 151, 158 (1931).

Indeed, there is no federal constitutional definition of a state "judge," *cf. Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991), or of a state judge's role. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 479 (1981) (Stevens, J., dissenting) ("The functions that a state court shall perform within the structure of state government are unquestionably matters of state law"); *see also* 449 U.S. at 463. State judges can be elected, appointed, or selected in just about any way the State chooses. What can Honda's asserted right to "judicial" review possibly mean if a State could have a neutral

layperson (perhaps otherwise known as a "juror") perform the function of reviewing punitive damage awards for excessiveness?

(a) At the time of the framing of the Fifth Amendment's Due Process Clause, the jury had the power to decide questions of both law and fact in civil as well as criminal cases. *See* Brief of Legal Historians as *Amici Curiae*.[21] "[S]o strongly felt was the jury's role . . . that, at an earlier point in this country's history, some of the States deemed juries the *final arbiters* of all questions arising in criminal prosecutions, whether factual or legal." *Johnson v. Louisiana*, 406 U.S. 356, 374 n.11 (1972) (Powell, J., concurring) (emphasis added). In federal criminal cases, juries were given control over legal questions even though there was no right of appeal from federal convictions until 1889, when Congress granted a writ of error in capital cases (extended in 1891 by the Evarts Act to "otherwise infamous crimes"). Quite plainly, the framers of the Fifth Amendment did not share Honda's view that due process demands strict judicial control of the jury.

The framers' view did not disappear in the nineteenth century. For example, in 1822 Mississippi enacted a statute making the jury's assessment of damages in slander suits final and binding. In

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[21] "At the time the Fifth Amendment was adopted, juries in America, 'unlike juries today, usually possessed the power to determine both law and fact.' . . . Although the practice of permitting juries to determine the law of the case has since been abandoned, the change occurred through common law development and legislative enactment — not because due process was thought to require it." Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 Ohio St. L. Rev. 859, 899-900 (1991) (citation omitted). For example, Chief Justice John Jay, in conducting a civil trial in which a State was a party, instructed a jury that it had the authority "to determine the law as well as the fact in controversy." *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794); *see also Bingham v. Cabot*, 3 Dall. 19, 33 (1795) (Iredell, J.) (explaining in civil case that "though the jury will generally respect the sentiments of the court on points of law, they are not bound to deliver a verdict conformably to them"); *Coffin v. Coffin*, 4 Mass. 1, 25 (1808) (noting, in civil action for slander, that "[t]he issue involved both law and fact, and the jury must decide the law and the fact"). In fact, the jury's power to decide the law in federal criminal cases was not conclusively denied until *Sparf v. United States*, 156 U.S. 51, 102 (1895), where the Court rejected the practice as ill-advised — but made no suggestion that such state practices were unconstitutional. In an exhaustive dissent, Justice Gray detailed the long history of jury's power to decide legal issues, reaching back to the earliest common law. *Id.* at 114-68. *See Wyley v. Warden*, 372 F.2d 742, 746 & n.7 (4th Cir.), *cert. denied*, 389 U.S. 863 (1967).

Lewis v. Black, 27 Miss. 425 (1854), the Mississippi High Court of Errors and Appeals upheld the denial of a new trial motion for excessive damages on the ground that "[t]he courts have no authority to set aside a verdict in actions under the statute, on account of alleged excess in the damages awarded by the jury. The statute provides expressly that the jury in such cases shall 'be the sole judges of the damages sustained.'" *Id.* at 436.

In *Chicago, Rock Island & Pacific Ry. v. Cole*, 251 U.S. 54 (1919) (Holmes, J.), this Court upheld a provision of the Oklahoma Constitution providing that "the defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left for the jury." *Id.* at 55. The Court held that due process permitted the State to leave the issue "wholly to the jury."[22]

(b) This Court has upheld capital punishment schemes vesting final authority in the jury to decide whether to impose the death penalty. *See Gregg v. Georgia*, 428 U.S. 153, 166 (1976) ("In jury cases, the trial judge is bound by the jury's recommended sentence").[23] To be sure, those systems typically provide for appellate review of the sentencing decision, but such review has not been deemed constitutionally required and thus cannot be used to

[22] "There is nothing . . . in the Constitution of the United States or its Amendments that requires a State to maintain the line with which we are familiar between the functions of the jury and those of the Court." 251 U.S. at 56. "Provisions making the jury judges of the law as well as of the facts in proceedings for libel are common to England and some of the States, and . . . the notion is not a novelty." *Id.* It is of no moment that contributory negligence was an affirmative defense in *Cole*, whereas Oregon has chosen to make the factors of ORS 30.925 elements of the plaintiff's case in proving punitive damages. Especially in civil cases, States have wide discretion in assigning issues as affirmative defenses or parts of the plaintiff's case.

[23] This Court has upheld capital sentencing systems in Texas, California, Pennsylvania, and Oregon that preclude the trial judge from substituting her judgment for the jury's decision to impose the death penalty. *Jurek v. Texas*, 428 U.S. 262, 269 (1976); *Blystone v. Pennsylvania*, 494 U.S. 299, 302 (1990); *Boyde v. California*, 494 U.S. 370, 374 (1990). This Court has already declined to review a judgment affirming the application of Art. VII, § 3 to death penalty cases. *State v. Wagner*, 752 P.2d 1136, 1170, 1176 (Or.), *cert. granted*, 492 U.S. 914 (1988), vacated and remanded for reconsideration in light of *Penry v. Lynaugh*, 492 U.S. 302 (1989), *aff'd*, 786 P.2d 93 (Or.), *cert. denied*, 498 U.S. 897 (1990).

support Honda's argument that due process demands judicial review of a jury's factual findings.[24] Similarly, throughout American history many States have permitted the jury to function as sentencer by fixing the maximum term of incarceration with only minimal guidance from the legislature, despite the traditional rule that, "once it is determined that a sentence is within the limits set forth in the statute under which it is imposed, appellate review is at an end." *Dorszynski v. United States*, 418 U.S. 424, 431 (1974). "Nothing in the Due Process Clause" intrudes on the choice of States "in dividing [sentencing] responsibility between judge and jury." *Chaffin v. Stynchcombe*, 412 U.S. 17, 22 (1973).

(c) "[D]ue process of law does not require that the courts, rather than administrative officers, be charged, in any case, with determining the facts upon which the imposition of [civil fines] depends." *Lloyd Saubado Societa v. Elting*, 287 U.S. 329, 335 (1932). It is hard to see how due process could mandate that judges ultimately determine the amounts of civil damages. Moreover, Congress has vested administrative agencies with final and binding decisionmaking authority over many questions, especially factual ones.[25] Honda's argument would require that judicial review be

[24] *Evitts v. Lucey*, 469 U.S. 387, 409 (1985) (Rehnquist, now C.J., dissenting) ("There is n[o] constitutional requirement that a State provide for any appeal at all. 'It is wholly within the discretion of the State to allow or not to allow such review.' If a State decides to confer a right of appeal, it is free to do so 'upon such terms as in its wisdom may be deemed proper.'") (citations omitted); *see also Whitmore v. Arkansas*, 495 U.S. 149, 167 (1990); *Murray v. Giarratano*, 492 U.S. 1, 18 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 555-58 (1987); *Abney v. United States*, 431 U.S. 651, 656 (1977); *Ross v. Moffitt*, 417 U.S. 600, 606, 610-11 (1974); *District of Columbia v. Clawans*, 300 U.S. 617, 627 (1937); *McKane v. Durston*, 153 U.S. 684, 687 (1894).

[25] *E.g.*, Micronesian Claims Act of 1971, Pub. L. No. 92-39, § 201, 85 Stat. 92, 96 (expired 1976); Immigration Act of 1917, ch. 29, § 19, 39 Stat. 874, 889, repealed by Act of June 27, 1952, ch. 477, § 403(a)(13), 66 Stat. 163, 279. Congress has also withdrawn federal courts' jurisdiction to review "final" determinations by administrative agencies. *E.g.*, 38 U.S.C. § 211(a); 42 U.S.C. § 405(h). Other statutes, apparently directed at state as well as federal courts, provide that certain agency decisions are "not subject to review . . . by a court." *E.g.*, 5 U.S.C. § 8128(b); 22 U.S.C. § 1623(h); *see also* Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 Harv. L. Rev. 367, 377 n.43 (1968).

This Court has not found statutory provisions precluding judicial review of such agency determinations to be constitutionally problematic. *E.g.*, *United*

available not only to entertain system-wide constitutional challenges to administrative schemes, but also to review the factual predicate for individual benefit determinations and other case-by-case decisions by those agencies. States, which are not bound by the Seventh Amendment, have even greater latitude than Congress in assigning matters to administrative agencies without affording judicial review of factual determinations. *E.g.*, *Crowell v. Benson*, 285 U.S. 22, 42, 57 (1932); *Mountain Timber Co. v. Washington*, 243 U.S. 219, 235, 238-39 (1917); *Markham v. Clark*, 978 F.2d 993, 995 (7th Cir. 1992).[26] And, even when some sort of hearing is required, this Court has frequently found that nonjudicial procedures provide all the process that is due, even where interests far more substantial than mere money damages are at stake. *Washington v. Harper*, 494 U.S. 210, 231-33 (1990); *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 545-46 (1985); *Parham v. J.R.*, 442 U.S. 584, 607 (1979); *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 13-14 (1979).

Honda's position thus appears to have no merit. In the end, however, this Court need not decide the question, because Oregon does in fact provide extensive judicial review of punitive damage awards.

B. Oregon Permits Judicial Review of Punitive Damages Awards

Honda's claim that Oregon law places "no check on juries" and embodies a "categorical renunciation" of judicial review, and that it "entrusts unreviewable authority to jurors," Pet. Br. at 11, is a gross distortion. Indeed, Honda's argument is prima facie disproven by the procedural history of this very case, in which

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States v. Fausto, 484 U.S. 439, 447 (1988); *Block v. Community Nutrition Institute*, 467 U.S. 340, 345-48 (1984); *United States v. Erika, Inc.*, 456 U.S. 201, 208 (1982); *Weinberger v. Salfi*, 422 U.S. 749, 757 (1975).

[26] Suppose a State provided a rational, quantified formula for compensation (or exemplary damages, or a civil penalty) in a statutory scheme, such as a workers' compensation or anti-discrimination law, to be administered by a special tribunal with full adjudicatory due process, but denied any judicial review beyond errors in law or statutory interpretation. Surely the lack of judicial review for evidentiary sufficiency would raise no due process question. *See, e.g.*, *Crowell v. Benson*, 285 U.S. at 42.

Honda itself raised passion-and-prejudice, substantial evidence, and other objections in the Oregon courts, and where no court held that such judicial review of damages was unavailable in Oregon.

1. Oregon Courts Have the Power to Review Federal Substantive Due Process Challenges to Punitive Damages Awards

Although Honda raises only a *procedural* due process claim, it also suggested in its petition for *certiorari* that Oregon courts "refus[e]" to "entertain and pass on the federal-law contention that a particular punitive verdict is so grossly excessive as to violate federal substantive due process." Pet. for *Cert.* 16 n.10. Notably, Honda does not repeat this allegation in its brief on the merits. There is a good reason for the change in argument: no Oregon court has *ever* held that it lacks the power to entertain a federal substantive due process challenge to a punitive damages award.

Indeed, even though it is debatable whether Honda properly framed a federal substantive due process claim below,[27] it is clear from the Oregon Supreme Court's opinion that the court *did in fact* test the punitive damages award by federal substantive due process standards — just as that court has been careful to respect the Supremacy Clause by applying federal "excessiveness" review in FELA and related cases. *See, e.g.*, *Staples v. Union Pacific R.*, 508 P.2d 426, 426 (Or. 1973). Although its decision in the case below predated *TXO*, the Oregon court explicitly recognized the difference between procedural and substantive due process and explained that the latter "relates to the requirement that the amount of the award be proportional to the defendant's conduct and may also be implicated when multiple awards of punitive damages are made against the same defendant for the same course of conduct." Pet. App. 20a n.10. The court also recognized its duty to "ensure that an award of punitive damages . . . bears a rational relationship

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[27] *See Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988). Honda's federal due process arguments were limited to *procedural* due process and, while it contended in general terms that the award was constitutionally "excessive," the only federal constitutional provision it invoked was the Eighth Amendment's Excessive Fines Clause. *See, e.g.*, Honda New Trial Mot. at 58; Honda Ct. App. Br. at 39; Honda Ore. Sup. Ct. Br., filed Aug. 27, 1991, at 1-2.

to a defendant's conduct and to the need for punishment and deterrence." *Id.* 28a.

The court further explained that, "'[u]nder *Haslip*, an award of punitive damages does not meet constitutional requirements unless the circumstances of the case indicate that the award is reasonable.'" *Id.* (citation omitted). But the court noted that in this case the proportions between the punitive award, on the one hand, and the plaintiff's compensatory damages and out-of-pocket loss, on the other, were "similar" to what they were in *Haslip* and were therefore no cause for constitutional concern.[28] With the additional guidance of *TXO*, it is obvious that the Oregon Supreme Court's decision not to upset the award on federal substantive due process grounds was in fact correct. The award here is demonstrably reasonable in light of Honda's "bad faith," 113 S. Ct. at 2722,[29]

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[28] The Oregon Supreme Court explained that:

> In *Haslip*, the Court stated that the award of punitive damages, which was upheld, was more than 4 times the amount of compensatory damages and more than 200 times the amount of out-of-pocket expenses of the plaintiff. 111 S Ct at 1046. The proportions here are similar. The award of punitive damages here is about 5.4 times the amount of compensatory damages and about 258 times the amount of out-of-pocket expenses of plaintiff.

Pet. App. 29a n.14.

[29] There was ample evidence that Honda's actions manifested "wanton disregard for the health, safety and welfare of others." ORS 30.925(1). As early as the 1970s, Honda knew, according to testimony of its former regional sales manager, that 3-wheeled ATVs were particularly unstable and prone to tipping over. Tr. 5:472-74, 480-81. Honda officials suggested specialized rider training, which the company rejected. Tr. 5:475-77. Its district service managers, who had responsibility for accident investigation, warned Honda that increasing engine size would exacerbate the tendency of ATVs to tip over backwards (the very kind of accident at issue in this case). Tr. 4:116-17. Nonetheless, Honda embarked on a strategy of developing larger and larger engines for 3-wheelers in order to out-compete other manufacturers with "bigger, faster, sexier" models. Tr. 5:478-79, 521.

In addition, it is undisputed that Honda was in receipt of documents from the Consumer Product Safety Commission detailing the instability of all-terrain-vehicles, *see* Pet. App. 3a-8a, which prove that Honda knew that, as of the date of Karl Oberg's accident, ATVs had caused injuries serious enough to warrant hospitalization to hundreds of thousands of people, as well as over a thousand deaths. Despite all these sources of notice to Honda that its

the fact that the wrongdoing here was "part of a larger scheme" to injure the public, *id*, and Honda's wealth. *Id.* at 2722 n.28.[30]

The federal substantive due process review performed by the Oregon court shows that Honda's efforts are misdirected. Whether excessiveness review under state-law criteria would *reduce* punitive awards is not the issue. The question is whether Oregon's system of constraints on jury discretion, coupled with judicial review according to a federal substantive due process standard, meets the constitutional minimum. Honda has not even addressed that question.[31] The striking similarities between the federal substantive due process review provided by Oregon and traditional excessiveness review, *TXO*, 113 S. Ct. at 2726 n.1 (Scalia, J., concurring in the judgment), suggest that Honda can have no due process complaint. Indeed, the statutory factors with which Oregon juries are instructed, *see* note 4, *supra* — which would provide the basis for any state-law excessiveness argument by Honda — are virtually the same "objective indicia" that compose the federal substantive due process test.

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vehicles were dangerous, and the tens of thousands of injuries that were occurring yearly, it continued to insist that its vehicles were perfectly safe and that every single accident was a result of rider misuse. Tr. 20:2197-98.

[30] *See* notes 2, 3 and 5, *supra*. Substantive due process plainly permits a jury to consider a corporation's wealth in assessing punitive damages. *See TXO*, 113 S. Ct. at 2722 n.28 (plurality opinion); *Haslip*, 499 U.S. at 21-22; *Washington Gas Co. v. Lansden*, 172 U.S. 534, 551 (1899); *New Orleans, J. & Great N. R. Co. v. Hurst*, 36 Miss. 660, 669 (1859); *Belknap v. Boston & M. R. Co.*, 49 N.H. 358, 374 (1870); *Cumberland Tel. & Tel. Co. v. Poston*, 30 S.W. 1040, 1041 (Tenn. 1895); 1 J.G. Sutherland, A Treatise on the Law of Damages 745 (1883).

[31] Honda's *amici* dramatically undercut any claim that Honda might belatedly advance on this score. For example, one *amicus* brief signed by Dean Griswold states that review according to a "reasonableness" standard (which Oregon, of course, provides) "ensure[s] that litigants are not subjected to punitive damages that are constitutionally excessive and that punitive damages — when warranted — are awarded in amounts that reasonably serve their deterrent and punitive purposes." Br. of American Council of Life Insurance, *et al.* at 18. There is thus little need for "excessiveness" review under state-law criteria.

2. The Oregon Supreme Court Has the Power to Adjust Damages Awards in Any Case in Which Legal Error Has Occurred

In its claim that Oregon law never permits courts to question the amount of damages awarded by a jury, Honda fails to mention a striking feature of the Oregon Constitution that would be the solution to all its objections that the trial was unfair — that is, if Honda's objections had any merit. Art. VII, § 3 provides that

> if, in any respect, the judgment appealed from should be changed, and the Supreme Court shall be of the opinion that it can determine what judgment should have been entered in the court below, it shall direct such judgment to be entered.

Thus, in a case where error has been committed during the trial — as Honda insists occurred here — the state supreme court, instead of reversing the judgment and sending the case back to the circuit court for retrial (as the Oregon Supreme Court most commonly does), may instead "direct" the amount of damages to be paid. *See* Lusk, *Forty-Five Years of Article VII, Section 3, Constitution of Oregon*, 35 Or. L. Rev. 1, 16-20 (1955) (citing 15 cases); *see also Sol-O-Lite Laminating Corp. v. Allen*, 353 P.2d 843, 850 (Or. 1960).

If Honda had pursued in the Oregon courts the sorts of objections to the jury instructions that Honda now seeks to raise before this Court, Pet. Br. at 26, 32-33, and if those claims had any merit, then Honda could have requested the Oregon Supreme Court to readjust the damages award rather than reverse and remand. The same is true regarding Honda's new-found argument that plaintiff's summation was improper. Pet. Br. at 4, 25. Honda asserts here that it was these legal errors that triggered the punitive damages verdict and that necessitate "excessiveness" review according to a weight-of-the-evidence standard. Pet. Br. at 24-26, 32-33. But it is quite disingenuous for Honda now to invoke discredited state-law claims — which we show elsewhere are procedurally barred and in any event without merit — to argue that the procedure it received was inadequate, for the simple reason that if those claims had any basis the Oregon Supreme Court would have had the authority to employ even more searching review than Honda seeks here.

3. Oregon Courts Have the Power to Review Punitive Damages Awards under a "Passion-or-Prejudice" Test

In addition, Honda fails to apprise this Court of the power of Oregon courts, so heavily relied on by Honda in its new trial motion and in its brief in the court of appeals, *see* pp. 6-10, *supra*, to reduce punitive damage awards where it appears "either from the size of the verdict itself or from any incident of the trial, that the damages were given under the influence of prejudice and passion." *Van Lom*, 210 P.2d at 468 (citing cases). Although in an appropriate case there might be debate over the extent of this power in Oregon, on the record of this case this Court must assume that Oregon courts engage in "passion-or-prejudice" review.[32]

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[32] Although the impact of Art. VII, § 3 on passion-or-prejudice review has never been definitely settled in Oregon, no less an authority than Justice McBride, who drafted the 1910 amendment that became Art. VII, § 3, explained that "in a case where the verdict is so outrageously beyond the proven facts as on its face to indicate passion or prejudice, and, especially, where impassioned and demagogic appeals to the jury have a tendency to arouse passion or prejudice, the courts have a right to set aside a verdict." *Donaghy v. Oregon-Washington R. & Nav. Co.*, 288 P. 1003, 1014 (Or. 1930). *See also Foley v. Pittenger*, 503 P.2d 476, 477 (Or. 1972) (reversing new trial — granted by trial court solely on the ground that the "excessive damages . . . appear[ed] to have been given under the influence of passion and prejudice" — not because trial court lacked such authority but rather because "[w]e have examined the record in this case" and cannot say "'either from the size of the verdict itself or from any incident of the trial, that the damages were given under the influence of prejudice and passion'") (quoting *Van Lom*; *Huston v. Trans-Mark Services, Inc.*, 609 P.2d 848, 854 (Or. App. 1980) (rejecting new trial motion because "defendant has failed to present any evidence . . . that the verdict was influenced by passion and prejudice" and "[h]ere, after examining the record, we find there was evidence to support the jury verdict as to the damage award"); *Brewer v. Erwin*, 658 P.2d 1180, 1182 (Or. App. 1983) (refusing to grant new trial on passion and prejudice grounds, finding that there was "no basis for [defendant's] conclusion" that "the jury's verdict was the result of passion and prejudice").

Even when Oregon civil procedure statutes were revised after the 1910 adoption of Art. VII, § 3, the statutes continued to refer to "passion and prejudice" as a basis for new trials. Subd. 5, § 5-802, O.C.L.A., *as revised*, ORS 17.610(5). In 1980, the Oregon statutes governing trial procedure were replaced by the Oregon Rules of Civil Procedure, and the express reference to "passion and prejudice" disappeared. But the move from statute to rules was intended to systematize civil procedure, not to "abridge, enlarge, or modify the substantive rights of any litigant." ORS § 1.735 (1985); Merrell, *The Oregon Rules of Civil Procedure — History and Background, Basic Application, and*

The basis for such an assumption is that in this case Honda indisputably enjoyed the benefit of "passion-or-prejudice" review in the proceedings below. Honda raised a passion-or-prejudice claim in its new trial motion in the trial court, where Oberg answered the claim *on its merits* and the court denied the motion in a written decision with no suggestion whatsoever that it lacked the power to entertain the passion-or-prejudice claim. *See* pp. 6-11, *supra*. Although the court did not elaborate its reasons for decision, it was not required to do so. *See TXO*, 113 S. Ct. at 2724 (plurality opinion). If Honda wanted a fuller explanation, it could have requested one. It did not. Honda now apparently expects this Court to presume that the trial court denied its motion on the ground that passion-or-prejudice review is unavailable under Oregon law, but there is absolutely no foundation for such an conclusion. *See* note 32, *supra*.

When the trial court passed on its passion-and-prejudice claim, Honda's procedural due process rights were fully satisfied, even under its own theory of what it is owed.[33] Because there is no due process right to appellate review of a denial of a new trial motion,[34] Honda's interests would have been fully vindicated even

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the "Merger" of Law and Equity, 65 Ore. L. Rev. 527, 533 (1986). Hence, the change cannot be read as eliminating passion and prejudice review. *See Finley v. United States*, 490 U.S. 545, 554 (1989). Indeed, the new Rules of Civil Procedure authorize new trials in the event of jury "misconduct" or any "[i]rregularity in the proceedings of the court, jury, or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial." ORCP 64B(1), (2). Appellate courts retain broad authority to order a new trial "if necessary and proper." ORS 19.130(1). And Oregon courts enjoy inherent common-law authority in any event. *See* Merrell, *supra*, at 538-41.

[33] Passion-or-prejudice review would eliminate Honda's procedural due process objection, because by definition it provides relief in those instances, if any, where juries are "biased" or "shaped by influences impermissible in our system of justice" or where juries base their decisions on "prejudice" against wealthy or foreign defendants. Pet. Br. at 23-26. Indeed, "passion and prejudice" standard is in truth the very common-law test that Honda claims to advocate. *See, e.g., TXO*, 113 S. Ct. at 2730 & nn.1, 2 (O'Connor, J., dissenting); Brief of Legal Historians.

[34] For 159 years, § 22 of the Judiciary Act of 1789 and its successors allowed appeal only on "writ of error." *See* 1 Stat. 84 (1789); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev.

if the state court of appeals and supreme court had ruled that passion-or-prejudice review does not exist in Oregon. In fact, neither appellate court cast doubt on the availability of passion-or-prejudice review. Both courts simply noted that the jury's judgment was adequately supported by the evidence. *See* Pet. App. 33a; *id* at 87a. Each of the three grounds advanced as supporting the passion-or-prejudice claim was reviewed and denied on appeal. *See* notes 7-10, *supra*. Because Honda invoked passion-or-prejudice review in its post-trial motion, and because there is no indication that the court refused to entertain that claim on its merits, reversal of the judgment below on the theory that Oregon law barred such review is out of the question.

4. Oregon Courts Also Have the Power to Review Damages Awards to Determine Whether There Is Substantial Evidence to Support the Jury's Measure of Damages

By its terms, Article VII, § 3 of the Oregon Constitution does not withdraw all powers of judicial review over damages awards. Rather, it provides in relevant part that:

> In actions at law, where the value in controversy shall exceed $200, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, *unless the court can affirmatively say there is no evidence to support the verdict*.

(emphasis added). Oregon courts have made clear that they do not

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49, 61-62, 102-05 (1923). This Court's numerous decisions prior to 1948 (when § 22 was finally repealed) refusing to review denial of new trial motions, *see, e.g., Southern Railway-Carolina Division v. Bennett*, 233 U.S. 80, 87 (1914); *Wabash Ry. v. McDaniels*, 107 U.S. 454, 456 (1882); *Railroad Co. v. Fraloff*, 100 U.S. 24, 81-82 (1879), were obviously consistent with due process. Moreover, the Seventh Amendment may bar federal appellate review of such new trial motions, an issue this Court has never decided. *See Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 446-48 & n.3 (8th Cir. 1961) (Blackmun, J.); Schnapper, *Judges Against Juries — Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237, 240 n.7, 243-44, 316-18 (1989).

follow a scintilla rule and that the question is "whether there was any *substantial evidence*" to support the verdict.[35]

Honda stakes its entire case on the assertion that this power is limited to assessing the sufficiency of evidence to support punitive liability, not the amount of damages. Pet. Br. at 8 n.5, 30-31 n.23. But Honda never supports its assertion. Under Oregon law, the appropriate amount of punitive damages is a question of fact to which the "substantial evidence" standard applies.[36] Thus, contrary to Honda's suggestion, Oregon courts have in fact vacated damage awards on the ground that the amount imposed by the jury was not supported by substantial evidence. *See, e.g., Roberti's House of Wines v. Somerset Wine Co.*, 703 P.2d 976, 979 (Or. 1985).[37]

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[35] *Fowler v. Courtemanche*, 274 P.2d 258, 275 (Ore. 1954); *Younger v. City of Portland*, 752 P.2d 262, 268 (Or. 1988).

[36] The Oregon Supreme Court has held that:

> It is impossible for the jury to arrive at the *amount* to be assessed against the defendant by way of punishment without considering and deciding questions of fact. It must determine first whether there was malice and, if so, the *degree* of that malice, both of them questions of fact. It may give consideration to all those elements enumerated in *Huckle v. Money*, [95 Eng. Rep. 768 (C.P. 1763)], and in doing so necessarily determines what are the facts.

Van Lom, 210 P.2d at 470 (emphasis added); *see also Friendship Auto Sales v. Bank of Willamette Valley*, 716 P.2d 715, 720 n.9 (Or. 1986).

Honda claims that the "considerations given to the jury in this case were not" questions of "pure fact." Pet. Br. at 33. But if the determination of the size of the punitive damages award were *not* deemed a factual matter, then Art. VII, § 3 would not limit judicial review of it *at all*. If determination of the size of the award *is* a factual question, then it is subject to review under the "substantial evidence" exception. Honda cannot have it both ways. Moreover, any complaint by Honda that the jury was given too subjective a set of criteria would amount either to a substantive due process objection, or to an objection about excessive jury discretion. Neither of those objections is before this Court.

[37] In *Huston v. Trans-Mark Services, Inc.*, 609 P.2d 848 (Or. App. 1980), for example, the court explained that, "[a]s to the excessiveness of the damage award, [*Van Lom* held that] there is no judicial review of a jury verdict merely for excessiveness of damages. . . . All a court can do, insofar as the facts are concerned, is to examine the record to determine whether it 'can affirmatively say there was no evidence to support the verdict.' Or. Const, amended Art VII, § 3. Here, after examining the record, we find there was evidence to support the jury verdict *as to the damage award*." *Id.* at 854 (emphasis added).

See also McElwain v. Kapatoff, 551 P.2d 105, 107 (Or. 1976) (rejecting claim that "excessive damages appeared to have been given under the influence of passion and prejudice" and explaining that "[t]here was evidence that plaintiff received a 50 percent compression fracture of the first lumbar vertebra which caused him to be hospitalized and to wear a body brace for several months"); *Aspuria v. Mello*, 464 P.2d 680, 683 (Or. 1970) ("Defendant's final contention that the award of $15,000 in general damages was error in the absence of evidence of permanent disability or the degree and amount of pain and suffering is even more clearly without merit, particularly in a case in which plaintiff was hospitalized for 185 days. *See Van Lom*").

Surprisingly, Honda refers to none of these cases in its brief, even though in the trial court and court of appeals it argued strenuously for judgment as a matter of law or a new trial on the ground that the size of the verdict was not supported by substantial evidence. *See* pp. 10-11, *supra*. Now, however, it claims that the half-century-old decision in *Van Lom* precludes all such review. Honda's post-*Haslip* change in strategy is unavailing.

First, the decisions in this case are best read as recognizing the power of courts to review the amount of punitive damage awards for substantial evidence. *See* pp. 11-12, *supra*. The state supreme court left no ambiguity that, in products liability cases such as this one, judicial review focuses on the sufficiency of the evidence to support the statutory criteria enumerated in ORS 30.925.[38] That Oregon judicial review focuses on the *size* of the

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[38] The supreme court explained that:

> If there is no evidence to support the jury's decision — in this context, *no evidence that the statutory prerequisites for the award of punitive damages were met* — then the trial court or the appellate courts can intervene to vacate the award. See ORCP 64B(5) (trial court may grant a new trial if the evidence is insufficient to justify the verdict or is against law).
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> *There was evidence to support [the jury's] determination*. Accordingly, the punitive damages award in this case did not violate the Due Process Clause of the Fourteenth Amendment . . . .

Pet. App. 27a, 33a (emphasis added). By "statutory prerequisites," the court plainly meant *all* of the statutory criteria enumerated in ORS 30.925, including

punitive damage award is also confirmed by the state court's explicit parallel to federal practice in diversity cases,[39] which plainly does not involve the sort of complete ban on judicial review of the size of punitive damage awards that Honda claims is mandated by Art. VII, § 3 in the Oregon system. Honda focuses on the Oregon Supreme Court's comment that it "did not interpret *Haslip* to hold that an award of punitive damages, to comport with the requirements of the Due Process Clause, always must be subject to a form of post-verdict or appellate review that *includes the possibility of a remittitur*," Pet. App. 25a (emphasis added), but Honda completely overlooks the critical qualification contained in the last clause.[40]

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the statutory factors to be used "in setting the amounts of [punitive] awards." Pet. App. 21a. These factors are akin to the special issues in capital punishment cases, where the Oregon Supreme Court has explained that the role of appellate courts under Art. VII, § 3 is to determine "whether there was evidence from which the jury could have found affirmative answers to all three questions." *State v. Wagner*, 752 P.2d 1136, 1170 (Or. 1988); *see also id.* at 1141 (listing the special issues).

[39] In discussing procedural protections available under Oregon law, the supreme court quoted the Fifth Circuit's reasoning that, "'in reviewing the constitutionality of an award of punitive damages, a court may not explicitly or implicitly recalculate the award of damages; moreover, it may not express an opinion whether the award is too high or too low. Rather, the court may only consider whether the circumstances of the case offer some support for *the amount of the award*.'" Pet. App. 28a (emphasis added and quoting *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1382 (5th Cir. 1991)). The Oregon Supreme Court noted that the "the relatively narrow scope of appellate review of punitive damages awards in Oregon is similar to that available to federal appellate courts reviewing awards of punitive damages made in federal district courts applying state law in cases involving diversity jurisdiction." *Id* at 29a.

[40] The Oregon court was simply indicating that *Haslip* does not mandate that a *remittitur* procedure is constitutionally required — a conclusion that is certainly correct in light of the dubious historical pedigree of the remittitur. *See Dimick v. Schiedt*, 293 U.S. 474, 484 (1935) (noting that remittitur practice "has been condemned as opposed to the principles of the common law by every reasoned English decision, both before and after the adoption of the Federal Constitution, which we have been able to find"); *Bonura v. Sea Land Serv., Inc.*, 512 F.2d 671, 673 (5th Cir. 1975) (*per curiam*) (Goldberg, J., dissenting) ("The doctrine of remittitur rests on a constitutional base of clay"); Carlin, *Remittiturs and Additurs*, 49 W. Va. L.Q. 1 (1942). Even though the remittitur has been grudgingly held to be *permitted* by the Seventh

Second, Honda exaggerates the breadth of *Van Lom*, as illustrated by the more recent Oregon cases inquiring into the sufficiency of evidence to support the size of damage awards. The question presented in *Van Lom* was whether "'[t]he *Supreme Court of Oregon* is empowered under Article VII, Section 3, Oregon Constitution, to reduce an excessive verdict.'" 210 P.2d at 462 (emphasis added and quoting defendants' brief). Accordingly, *Van Lom's* discussion of the power of a *trial court* to engage in substantial evidence review was sheer dictum, designed to "throw light on the propositions which the defendant seeks to maintain" relating to the supreme court's power. *Id.* at 463. Moreover, *Van Lom* was an assault and battery case in which the jury instructions provide no concrete guidelines for setting damages, not a products liability action governed by the statutory criteria of ORS 30.925. Even so, *Van Lom* reaffirmed that Art. VII, § 3 did not strip trial courts of all powers of post-trial damages review. Rather, what Art. VII, § 3 eliminated, according to *Van Lom*, was the "power of a trial court to re-examine the evidence and set aside a verdict because it was excessive *or in any other respect opposed to the weight of the evidence*." 210 P.2d at 465.[41]

With respect to the powers of the state supreme court, *Van Lom* noted that, under longstanding practice, appellate courts have

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Amendment, it would be untenable to suggest that it is somehow *required* by the Fourteenth. Whether States choose to adopt it is a matter of state law. *E.g., Firestone v. Crown Center Redevelopment Corp.*, 693 S.W.2d 99, 110 (Mo. 1985).

[41] To the same effect is the court's comment that an Oregon court lacks the power "to declare that . . . the evidence does not support the verdict 'in its entirety' *simply because the court thinks that the verdict is too large*." 210 P.2d at 467. The comment meant merely that Art. VII, § 3 does not permit reviewing courts to vacate awards based on their subjective views about "excessiveness."

To be sure, *Van Lom* also rejected the argument that "the circuit courts 'have authority to grant a new trial if there is no evidence to support the verdict in its entirety, although there may be some substantial evidence that the plaintiff was damaged to some extent less than the amount of the verdict.'" *Id.* at 463 (citation omitted). But the *Van Lom* court's rejection was premised on its understanding of this argument as nothing but a weight-of-the-evidence excessiveness standard in disguise: "it is in reality only a formula under which the courts would in practice do the very thing which they were accustomed to do before Art. VII, § 3, was adopted." *Id.* at 464. Accordingly, *Van Lom's* dictum on this point fails to establish that Honda's extreme account of Oregon law is anything more than caricature.

no authority to review the refusal of a trial court to set aside verdicts which the appellate courts deem to be excessive.[42] This limit on the power of appellate courts has nothing to do with Art. VII, § 3. Honda's extensive reliance on *Van Lom* is therefore misguided, for it was in the specialized context of the limits on *appellate* review that the Oregon Supreme Court complained that "[t]he court is of the opinion that the verdict of $10,000.00 is excessive" but that the court was powerless to reduce it. 210 P.2d at 462.[43] The same appellate handwringing could have occurred in Oregon before the adoption of Art. VII, § 3,[44] and in fact in *any* federal appellate court for more than a century and a half after enactment of the Judiciary Act of 1789, which barred appellate review of the amount of damages and other factual issues. *See* note 34, *supra*.

Third, even indulging Honda's expansive reading of *Van Lom*, Honda could have challenged the amount of damages sought by Oberg *in advance* as unsupported by substantial evidence. By its terms, Art. VII, § 3 applies only to *re-examination* of facts *after* a jury has determined them initially; it presents no bar to determining, in advance, the maximum scope of the jury's authority under the law. For example, at the pleading stage Honda could have availed itself of the special Oregon rule that the complaint must specify the amount of money damages the plaintiff seeks. As Honda acknowledges, "[u]nder Oregon law, 'the amount of damage alleged in the complaint does fix a maximum limit, and [the jury is] not

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[42] *See* 210 P.2d at 465 ("'If the jury acted upon a gross mistake of fact, or were governed by some improper influence, or bias, the remedy, therefore, rested with the court below, under its general power to set aside the verdict. . . . Whether its action, in that particular was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of the parties.'") (quoting *New York Central & Hudson R. Co. v. Fraloff*, 100 U.S. 24, 25 (1879)).

[43] To the same effect is the court's comment in *Fowler v. Courtemanche*, 274 P.2d at 275, that, if it could do so, "we would unhesitatingly hold that the award of $35,000 as punitive damages was excessive."

[44] *See, e.g., Lindsay v. Grande Ronde Lumber Co.*, 87 P. 145, 149 (Ore. 1906) (noting that refusal of trial court to "set aside the verdict because it is excessive . . . cannot be reviewed on appeal").

permitted to award plaintiff more than that amount.'" Pet. Br. at 5 n.2 (quoting jury instructions in this case).[45] Similarly, Honda was obviously free, by way of a directed verdict motion or otherwise, to put Oberg to the task *before* the verdict of demonstrating to the trial court's satisfaction that the evidence adequately supported his damages claim of $5 million. The possibility of such pre-verdict review is hardly hypothetical — Honda made several such motions in this very case. *See* note 1, *supra*.

At the instruction stage, Honda could have objected to the jury charge on the ground that it permitted the jury to return a punitive damage award of $5 million when such a sum was not supported by the evidence. *Van Lom* specifically recognized the availability of such an objection, observing that, when the court reduced the size of the damage award in *Lyons v. Browning*, 133 P.2d 599, 600 (Or. 1943), "[o]ne of the grounds of our decision was that the court erred in instructing the jury in effect that they were authorized to find a verdict for the plaintiff in the amount of $1,575.00 (the full amount prayed for) when the evidence would not support such a verdict." 210 P.2d at 467; *see also id.* (in *Weatherspoon v. Stackland*, 271 P. 741 (Or. 1928), "there was error on the part of the trial judge in submitting the case as alleged in the pleadings" when the amount of damages was not supported by the evidence). Such an objection — based on asserted legal error in instructing the jury — would in no way trigger Art. VII, § 3, which applies only to *ex post* review of facts found by "a properly instructed jury." 210 P.2d at 466.

Finally, before the jury retired for its deliberations Honda could have moved to submit a special verdict form in order to require the jury to break down the punitive damage award into its evidentiary components that could then be reviewed for substantial evidence. In the case at bar, the punitive damage issue was governed by the statutory criteria enumerated in ORS 30.925. Honda could have asked the jury to specify the criteria and evidence on which it was relying and to explain, in whatever terms Honda chose, precisely how it arrived at a particular number for the award. Each of the jury's evidentiary steps could then have been reviewed

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[45] *See, e.g., Lane v. Kelley*, 643 P.2d 1375, 1376 (Or. 1982) (upholding order of court striking plaintiffs' claim for $2,400 in damages as unsupported by the evidence in the case).

for sufficiency by the trial and appellate courts, just like any other decision by the jury in the case. The reason Honda did not do so was likely strategic; empirical evidence suggests that special verdict forms requiring the jury to proceed in this manner produce higher damage awards. Greene, *On Juries and Damage Awards: The Process of Decisionmaking*, 52 Law & Contemp. Probs. 224, 237-38 (1989). But Honda cannot now complain of absence of process when it chose not to avail itself of procedures offered by Oregon.

II. THE DUE PROCESS CLAUSE DOES NOT REQUIRE "EXCESSIVENESS" REVIEW UNDER A WEIGHT-OF-THE-EVIDENCE STANDARD

We do not deny that procedural due process requires that a party receive notice, the opportunity to be heard, a neutral decisionmaker, and a full and fair hearing. Oregon provides such process. Moreover, Oregon guarantees that any result is (a) consonant with federal substantive due process, (b) free of legal error, (c) not the product of passion or prejudice, and (d) supported by substantial evidence. Honda, however, argues that the Constitution demands *more*: that a judge review the jury's verdict to ensure that it is consonant with the judge's individual view of the weight of the evidence as to what is "excessive." Not surprisingly, neither history nor the *Mathews v. Eldridge* test supports Honda's claim, for it would have radical and ultimately unacceptable implications for the systems of civil, criminal, and administrative law in the United States.

A. Tradition Indicates that Weight of the Evidence "Excessiveness" Review is Not Constitutionally Required

Honda's history of the judicial review of damage awards is oversimplified and misleading. As discussed in the exhaustive Brief *Amici Curiae* of Legal Historians, tradition lends no support at all to Honda's position that a "weight-of-the-evidence" standard is constitutionally mandated.

Initially, English courts had no power *at all* to grant new trials for perceived "excessiveness." Gradually they seized such power, but only in cases of jury bribery and corruption, and as late as 1764 an English court observed that "there is not one single case (that is

law) in all the books to be found, where the Court has granted a new trial for excessive damages in cases for torts." *Beardmore v. Carrington*, 95 Eng. Rep. 790, 793 (C.P. 1764).[46]

In the nineteenth century United States, personal injury tort awards and punitive damage verdicts were reviewed extremely deferentially, if at all. American courts observed the rule that such damages were the jury's domain. At most, courts asked whether an award was so irrational on its face as to be plainly the product of "passion and prejudice," not whether it was "excessive" simply because it was contrary to the judge's personal view of the "weight of the evidence." *E.g.*, T. Sedgwick, A Treatise on the Measure of Damages 533 (1868); *Walker v. Smith*, 4 U.S. (4 Dall.) 389 (1804) (Washington, Circuit Justice); *Thurston v. Martin*, 23 F. Cas. 1189, 1190 (1830) (Story, Circuit Justice). "[I]t has been the traditional practice of American courts to leave punitive damages (where the evidence satisfies the legal requirements for imposing them), to the discretion of the jury. . . . It is just as clear that no particular procedures were deemed necessary to circumscribe a jury's discretion regarding the award of such damages, or their amount." *Haslip*, 499 U.S. at 24-25, 26-27 (Scalia, J., concurring in judgment).

B. *Mathews v. Eldridge* Does Not Show that Weight-of-the-Evidence "Excessiveness" Review is Constitutionally Mandated

Honda's *Mathews v. Eldridge* argument is premised on the assumption that Oregon affords no judicial review whatsoever. Pet. Br. at 21 ("in the absence of some form of judicial review, defendants will suffer an erroneous deprivation of their property"). Once this error is corrected, Honda's argument collapses. For then Honda's argument reduces to the assertion that an award that is the product of a fair proceeding free from legal error, that is not the

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[46] Granting new trials for any reason did not meet with colonial approval. "The award of new trials for any reason [was] regarded with profound suspicion by the revolutionary generation. 'The practice of granting new trials,' a Virginia judge noted in 1786, 'was not a favourite of the courts of England' until the elevation of Lord Mansfield, 'whose habit of controling juries does not accord with the free institutions of this country.'" M. Horwitz, The Transformation of American Law, 1780-1860, at 142 (1977).

result of passion or prejudice, and that is supported by substantial evidence, is nonetheless somehow "legally erroneous" or "fundamentally [un]fair," Pet. Br. at 29-30, simply because a judge would find it "excessive" in the sense that it is against his or her personal view of the weight of the evidence.

This Court has never held that a litigant has a constitutional right to a new trial on the basis of this sort of personal evaluation by a judge, even in the criminal context.[47] This Court has always indicated that "[a] hearing before judgment, with full opportunity to present all the evidence and arguments which the party deems important, is all that can be adjudged vital. Rehearings, new trials, are not essential to due process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment, satisfies the demand of the Constitution in this respect." *Pittsburgh, Cincinnati & Chi. Ry. v. Backus*, 154 U.S. 421, 426-27 (1894); *see also Pleasants v. Fant*, 89 U.S. 116, 121 (1875) (no right to weight of the evidence review). Honda's flamboyant argument, if accepted, would require this Court to overrule its unanimous decision in *Louisville and Nashville R.R. Co. v. Woodson*, 134 U.S. 614, 623 (1890), upholding the constitutionality of a practice among the States, "in force for more than sixty years before the adoption of the Fourteenth Amendment," of restricting weight-of-the-evidence review. This Court would also have to reconsider its view, which no Justice has ever questioned, that "[w]hether a state trial judge may assess evidence as a '13th juror' is a question of state law." *Hudson v. Louisiana*, 450 U.S. 40, 44 n.5 (1981); *see also Tibbs v. Florida*, 457 U.S. 31, 42 (1982).

Moreover, it is doubtful that the *Mathews* framework applies here at all. Honda complains that "the jury applies law it doesn't

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[47] Due process has never been thought to require anything as extravagant as "weight of the evidence" review, even by federal courts in criminal cases. *E.g.*, *Thompson v. Louisville*, 362 U.S. 199, 206 (1960) ("no evidence" rule); *Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (whether "no rational trier of fact could have found proof beyond reasonable doubt"). Similarly, this Court has applied deferential review even with respect to factfinding relevant to a federal claim. *E.g.*, *General Motors v. Washington*, 377 U.S. 436, 442 (1965) ("substantial evidence"); *Egan v. Hart*, 165 U.S. 188, 188-189 (1897) (no power of review over facts at all). The instant case concerns Honda's ability to assert exclusively state-law claims, since the Oregon courts will entertain any federal substantive due process attacks to a punitive damage award.

understand to facts it can't get straight," and that juries are "untrained," "ignoran[t]," and "worthless." Pet. Br. at 21-22 n.16 (citations omitted).[48] But this remarkable claim ignores the systemic values at stake here. Our judicial system manifests a clear preference for "the commonsense judgment of the jury as a bulwark . . . 'against the compliant, biased, or eccentric judge.'" *Johnson v. Louisiana*, 406 U.S. 356, 373 (1972) (Powell, J., concurring). Moreover, ever since de Tocqueville, the role of the jury as an instrument of self-government has been well recognized.[49] According weight to a jury's factual findings dignifies that institution; the judicial second-guessing proposed by Honda would denigrate it. As the *amicus* briefs of the Oregon Attorney General, et al., and the Oregon Trial Lawyers Ass'n demonstrate, Art. VII, § 3 reflects many of the same values as underlie the Seventh Amendment. Honda would treat the jury system as somehow suspect, or at least as no weightier than the humdrum bureaucracy involved in *Mathews*. Such a view intrudes on the constitutionally protected authority of the States to govern themselves and to

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[48] The controversial social science cited by Honda is hardly limited to the damages context, and if Honda's arguments were accepted, the next litigant would surely claim that permitting a jury to assess damages in the first place — or perhaps even to determine liability — would violate due process in a case involving a "corporate defendant" or "well-known foreign corporation." Pet. Br. at 26.

[49] *See Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2085 (1991); *see also Dimick v. Schiedt*, 293 U.S. 474, 485-86 (1934); *Galloway v. United States*, 319 U.S. 372, 397-400 (1943) (Black, J., dissenting); *Parkland Hosiery Co. v. Shore*, 439 U.S. 322, 338-44 (1979) (Rehnquist, now C.J., dissenting). "Those who emigrated to this country from England brought with them [the jury system] 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.'" *Thompson v. Utah*, 170 U.S. 343, 349-350 (1898). The jury is, in the words of legal historian and Judge Morris Arnold, "the single most important institution in the history of Anglo-American law." *The Civil Jury in Historical Perspective*, in The American Civil Jury 9-10 (1987); *see also United States v. Wonson*, 28 F. Cas. 745, 750 (1812) (Story, Circuit Justice); Justice Clark, *The American Jury: A Justification*, 1 Valparaiso L. Rev. 1, 1-7 (1966); Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 Tex. L. Rev. 47, 48-52, 58 (1977).

"structur[e] their governments" free from federal interference.[50]

In any event, *Mathews v. Eldridge* provides no support for Honda's argument.

1. The private interest at issue

The private interest at issue here is money damages. This Court has always indicated that society has a "minimal concern with the outcome" of proceedings with these stakes, *Santosky v. Kramer*, 455 U.S. 745, 755 (1982), and in the context of actions for civil penalties between private parties this Court has steadfastly declined to add new procedural devices to the traditional requirements of notice, a meaningful opportunity to be heard, and a neutral decisionmaker. *See Haslip*, 499 U.S. at 23 n.11; *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989); *United States v. Halper*, 490 U.S. 435, 450 (1989).[51]

2. The likelihood of "error"

We have already shown that Honda's definition of "error" is fatally flawed. There simply is no basis for Honda's claim that "error" occurs any time a judge would find that an award was contrary to the weight of the evidence. *See* pp. 40-41, *supra*. Moreover, Honda's statistical arguments lack any merit. The reality is that punitive damage awards are lower in Oregon than in most other States. *See* p. 19, *supra*. Honda's claim that grants of

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[50] *Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 832 (1992); *see also New York v. United States*, 112 S. Ct. 2408, 2418, 2421, 2432-33 (1992); *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399-2403 (1991).

This Court has warned, in limiting the scope of *Mathews* in an analogous context, that "the expansion of . . . constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between" federal and state power. *Medina v. California*, 112 S. Ct. 2572, 2576 (1992).

[51] Honda argues that the "quasi-criminal" nature of punitive damages, Pet. Br. at 21, warrants additional procedural safeguards, but that merely shows that *Mathews* is inappropriate for addressing the procedural requirements in punitive damages cases. This Court has held that *Mathews* "does not provide the appropriate framework for assessing the validity of state procedural rules" that are "part of the criminal process." *Medina v. California*, 112 S. Ct. 2572, 2576 (1992) (competency rules).

remittiturs in recent cases illustrate the need for judicial review, Pet. Br. at 27; WLF Br. at 5, is also founded on shoddy analysis of cases. As explained by one *amicus*, many of these cases are incorrectly described as ones in which awards were reduced for "excessiveness," when *in fact* they involve findings of legal error or of insufficiency of the evidence to support liability. *See* TLPJ Br. Even under Honda's reading of Oregon law, judicial review is available in all such cases. Indeed, the Oregon Supreme Court has the power to retry the damages issue *de novo* in proceedings where legal error has occurred below. *See* Part I-B-2, *supra*.

The primary reason cited by Honda for weight-of-the-evidence review in punitive damages cases is that juries are "bedazzled" by defendants' wealth, corporate status, or foreign ownership. We have already shown that Honda's complaint has no basis in the record of this case. *See* notes 2, 3, 5-10, *supra*. Honda's assertion that juries cannot be trusted to obey their instructions flatly contradicts its position below, where it pressed no claim that the jury had failed to follow its instructions. *See* p. 12, *supra*. In any event, the social science evidence does not bear out Honda's claim,[52] which is reminiscent of attempts to carve a "complexity

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[52] The leading student of the jury has written that "in the course of many years of study . . . I, personally, have become increasingly impressed with the humanity, strength, sanity and responsibility of the jury." Kalven, *The Dignity of the Civil Jury*, 50 Va. L. Rev. 1055, 1075 (1964). The landmark study by Harry Kalven and Hans Zeisel, The American Jury (1966), established not only the factfinding competence of juries but also their basic fairness. In the sample of cases analyzed, judges agreed with juries 78 percent of the time. In civil cases the disagreements were balanced evenly between plaintiff and defendant verdicts. *See id.* at 58, 63. The authors noted that jurors' "very inexperience is an asset because it secures a fresh perception of each trial, avoiding the stereotypes said to infect the judicial eye." *Id.* at 8.

This Court has already considered and rejected Honda's attack on the jury, *Duncan v. Louisiana*, 391 U.S. 145, 156-57 (1968) (citing Kalven & Zeisel); *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 355 (1979) (Rehnquist, now C.J., dissenting) (also citing Kalven & Zeisel). Honda has presented nothing to change this Court's prior conclusion. Indeed, Congress recently determined that "[j]ust as they have for hundreds of years, juries are fully capable of determining whether an award of damages is appropriate and if so, how large it must be to compensate the plaintiff adequately and to deter future repetition of the prohibited conduct." H.R. Rep. No. 40, 102d Cong., 2d Sess., 1992 U.S. Code Cong. & Admin. News 602.

A recent symposium organized by the Brookings Institution and American Bar Association concluded that the jury is "a valuable process for decisionmaking and an effective means for the fair resolution of disputed fact." Brookings Inst., Charting a Future for the Civil Jury System 8 (1992). The largest empirical study of actual jury performance found that "[j]uries overwhelmingly take their duties seriously"; "[j]uries are evidence-oriented ... with the personalities of the participants in the trial and other subsidiary matters only of minor concern to them"; "[j]uries as a group apparently also understand enough of the law that they are able to arrive at legally supportable verdicts in a very large majority of cases"; and "jurors rarely increase the size of an award because they think the defendant has ample insurance to cover it, nor do they ordinarily make awards out of sympathy." J. Guinther, The Jury in America 102 (1988).

The evidence shows that the deliberative process allows jurors to pool their collective memories and intellect, so that they are able accurately to recall the evidence and apply the law. V. Hans & N. Vidmar, Judging the Jury 112, 117-18, 120-21, 129 (1986). "[T]he data lend no support to the widely held view that jurors are more generous than judges or arbitrators in awarding noneconomic damages." Vidmar & Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 Iowa L. Rev. 883, 896 (1993). If anything, juries seem to be "generally favorable toward business, skeptical more about the profit motives of plaintiffs than of business defendants, and committed to holding down awards." Hans, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 Law & Soc'y Rev. 85, 93 (1992); *see also* Clermont & Eisenberg, *Trial By Judge or Jury: Transcending Empiricism*, 77 Cornell L. Rev. 1124, 1125-26 (1992) (in medical malpractice and products liability cases, plaintiffs received favorable verdicts more often from judges than from juries).

The materials cited by Honda do not support its argument:

- Broeder, *The University of Chicago Jury Project*, 38 Neb. L. Rev. 744, 745, (1959) (observing that "for every charge leveled against the jury in this debate there is likewise to be found a vigorous defense").
- Greene, *On Juries and Damage Awards: The Process of Decisionmaking*, 52 Law & Contemp. Probs. 225, 245-46 (1989) ("[V]ery little is known about the ways that jurors determine punitive or exemplary damages . . . . [I]t is clear that jurors' reasoning is much more involved and sophisticated than [some believe]").
- Hans, *The Jury's Response to Business and Corporate Wrongdoing*, 52 Law & Contemp. Probs. 177, 202 (1989) ("Past research on jury decisionmaking gives us reason to be optimistic that lay juries are up to the task of comprehending and assessing liability in the vast majority of cases involving businesses and corporations. . . . [E]ven in cases involving some of the most negatively evaluated businesses around — the tobacco companies — juries show remarkable restraint in judging corporate culpability").
- Hans & Ermann, *Responses to Corporate Versus Individual Wrongdoing*, 13 Law & Human Behavior 151, 164 (1989) ("those who claim [that] deep pockets influence jury awards may be neglecting to take into account a coexisting and more critical determinant: higher expectations of corporate behavior").
- Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 Ohio St. L.J. 158, 176, 178 (1958) ("the filtering of individual eccentricity through the group process furnishes a major safeguard in the jury system. It is not merely that twelve heads may be better than one but that a verdict hammered out as a group product is likely to have important strengths"; "[w]hile jury awards are on the average higher than judge awards, there are a surprising proportion of cases in which the judge would have given more than the jury in fact did").
- Steele & Thornburgh, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. Rev. 77, 98 (1988) (concluding that "a typical jury makes a good faith effort to use its instructions for the purpose intended, that is, to reach a verdict according to the law"; criticizing lawyers for drafting complex and confusing instructions; and proposing reforms).

[53] See *In re Financial Securities Litig.*, 609 F.2d 411, 427-31 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980); *SRI Int'l v. Matsushita Elec. Corp.*, 775 F.2d 1107, 1126-31 (Fed. Cir. 1985); *Kian v. Mirro Aluminum Co.*, 88 F.R.D. 351, 355 (E.D. Mich. 1980); *Radial Lip Mach., Inc. v. International Carbide Corp.*, 76 F.R.D. 224, 227-29 (N.D. Ill. 1977).

[54] Oregon need not rely on the presumption of regularity in a vacuum, since it has created protective devices to diminish significantly the prospect of jury irresponsibility. *See* note 7, *supra*.

exception" into the Seventh Amendment.[53] Oregon is entitled to rely on the same principle that underlies our historic dedication to jury trial: "the conviction that each juror will faithfully perform his assigned duty." *Johnson v. Louisiana*, 406 U.S. 356, 379 (1972) (Powell, J., concurring); *Richardson v. Marsh*, 481 U.S. 200, 206 (1988) ("the almost invariable assumption of the law that jurors follow their instructions").[54] Indeed, this Court has recently affirmed the capacity of jurors properly to follow less-than-pellucid instructions even in the death penalty context, where the risk of jury passion and prejudice is surely at least as high as it is in a case like the one at bar. *Victor v. Nebraska*, Nos. 92-8894, 92-9049 (Mar. 22, 1994).

Honda also claims that the assessment of punitive damages is better suited to judge than jury. Pet. Br. at 23-26. But this argument is a radical departure from centuries of tradition, in which punitive damages have "always been left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case." *Day v. Woodworth*, 54

U.S. (13 How.) 363, 371 (1852); *see also* Br. of Legal Historians; *Tull v. United States*, 481 U.S. 412, 428 (1987) (Scalia, J., concurring in part and dissenting in part); *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 521 (1885); *Barry v. Edmunds*, 116 U.S. 550, 565 (1886). In fact, "[j]ury determination of punitive damages has such long and principled recognition as a central part of our system that no further evidence of its essential fairness or rationality ought to be deemed necessary." *Haslip*, 499 U.S. at 40 (Kennedy, J., concurring in judgment).

The reasons for this tradition are hardly obscure. Assessment of punitive damages usually requires fact-intensive inquiries into the *degree* of a defendant's intentionality and bad faith, which involve evaluations of witness credibility and demeanor; into whether a defendant's wrongdoing is part of a larger pattern or practice; and into the expected gain or potential harm of the defendant's conduct. While juries may make mistakes, so may judges, and there are quite plausible reasons for thinking that "juries are better qualified than judges to decide questions of fact." Tongue, *In Defense of Juries as Exclusive Judges of the Facts*, 35 Or. L. Rev. 143, 161-70 (1956). Moreover, the jury's "representative character permits its verdicts to express the sense of the community. . . . '[I]t is the jury's function to make the difficult and uniquely human judgments that defy codification and that buil[d] discretion, equity, and flexibility into a legal system.'" *Haslip*, 499 U.S. at 40-41 (Kennedy, J., concurring in judgment) (citation omitted); *see also Coffin v. Coffin*, 4 Mass. 1, 41 (1808). The judgment of history is that juries are better than judges at assessing the community's sense of outrage and deciding both the factual and qualitative questions necessary to impose punitive damages — or at least a state like Oregon might so conclude.[55]

[55] Honda's claim that reviewing judges should be authorized to override jury verdicts on the basis of "the range of punishments to which comparable wrongdoers have been subjected," and other information not available to the jury, Pet. Br. at 24, misses the point. This Court has indicated that proportionality review is not constitutionally required even in the death penalty context. *Pulley v. Harris*, 465 U.S. 37, 44-51 (1984). Moreover, the Court has expressed "skeptic[ism]" about the feasibility of such "intrajurisdictional and interjurisdictional comparisons" in punitive damage cases because "no two cases are truly identical." *TXO*, 113 S. Ct. at 2720 (plurality opinion). "[N]onuniformity cannot be equated with constitutional infirmity," *Haslip*, 499 U.S. at 41 (Kennedy, J., concurring in judgment), because the jury, not the court, is charged with "mak[ing] a *qualitative* assessment based on a host of facts and circumstances unique to the particular case before it." *TXO*, 113 S. Ct. at 2720 (plurality opinion) (emphasis added). Moreover, Honda's argument that due process requires the jury's award to be reviewed according to information not available to the jury would in federal diversity cases raise serious questions under the Re-Examination Clause of the Seventh Amendment. *See Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 107-08 (4th Cir. 1991).

Finally, judicial review according to an "excessiveness" standard is hardly the panacea that Honda claims. In fact, until this case, the defense bar had disparaged judicial review as producing haphazard and irreconcilable results.[56] As Justice Kennedy has commented, "[a] reviewing court employing [the excessiveness] formulation comes close to relying upon nothing more than its own

[56] *See* Br. of Alabama Business Council in *TXO* at 17 (criticizing judges for relying on "their own subjective notions when reviewing punitive awards and warning that "*Haslip* merely transferred subjective discretion to the reviewing courts"); Br. of CBS, Inc., *et al.* in *TXO* at 23 ("Judges, like juries, can find neutrality difficult"); Br. of Amer. Automobile Mfgrs. Ass'n in *TXO*, at 9 (arguing for stricter jury instructions — such as those adopted by Oregon — rather than judicial review because "'[g]etting it right the second (or third or fourth) time around' is extremely costly and wasteful"). Even in this case, Honda's *amici* attack the usefulness of judicial review. *E.g.*, Br. of Product Liability Advisory Council at 26 ("Awards are affirmed based upon the judges' highly subjective notions of what constitutes good domestic, and sometimes even foreign, policy. . . . Review in the lower courts . . . remains largely subjective").

Blackstone warned that "in settling and adjusting a question of fact, when entrusted to any single magistrate, partiality and injustice have an ample field to range in . . . by artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder." 3 W. Blackstone, Commentaries 380 (1803); *see also* Wigmore, *To Ruin Jury Trial in Federal Courts*, 19 Ill. L. Rev. 97, 98 (1924) (juries less subject to bias and corruption). Schnapper, *Judges Against Juries — Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237, 253-58. Indeed, in *TXO* the Washington Legal Foundation argued that elected state judges (as judges in Oregon are) *pose* the very threat of discrimination against out-of-state corporations that Honda now claims they will *remedy*. *See* WLF Br. in *TXO* at 3.

subjective reaction to a particular punitive damages award . . . . This type of review, far from imposing meaningful, law-like constraints on jury excess, could become as fickle as the process it is designed to superintend." *TXO*, 113 S. Ct. at 2725 (Kennedy, J., concurring in part and concurring in the judgment). Indeed, even those who have in the past questioned the procedural fairness of jury discretion in punitive damages cases have readily conceded that after-the-fact judicial review is not the answer. *Haslip*, 499 U.S. at 43-44, 52-53, 55-56 (O'Connor, J., dissenting).

3. Oregon's interest

Honda ignores Oregon's substantial interests in Art. VII, § 3. By leaving punitive damage decisions to a jury of laypersons, the people of Oregon have decided that the most important qualification for making those determinations is connection with ordinary life in Oregon. *Cf. Gregory v. Ashcroft*, 111 S. Ct. 2395, 2405 (1991); *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973). Affirming the importance of the jury is in a very real sense an expression of "the choice, the right, of the people to be governed by their citizen peers." *Foley v. Connelie*, 435 U.S. 291, 296 (1978).

Moreover, Art. VII, § 3 curbs unnecessary retrials by eliminating the wholly gratuitous power of judges to set aside verdicts based on their own views of the weight of the evidence and by establishing the state supreme court's power to adjust damages where legal error had occurred below. *See* Tongue, *supra*, 35 Or. L. Rev. at 143-44, 174-79.[57] Reducing the expense and long delay of litigation, and thus ensuring access to the courts for Oregon's citizens, is a substantial interest that should not be denigrated. *Cf. Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983); *Chambers v. Baltimore & Ohio Railroad Co.*, 207 U.S. 142, 148 (1907); *Armster v. United States District Court*, 792 F.2d 1423, 1429-30 (9th Cir. 1986); *Los Angeles County Bar*

[57] Any suggestion that Art. VII, § 3, was simply a pro-plaintiff measure adopted to increase the size of Oregon damage awards would be belied by the provision's enlargement of the state supreme court's powers, as well as the role of some of the most prominent members of the Oregon bar and business community in drafting and supporting it. *See* Lusk, *supra*, 35 Ore. L. Rev. at 2; Br. of Oregon Trial Lawyers Ass'n.

Association v. Eu, 979 F.2d 697, 706 (9th Cir. 1992). Honda's dismissal of Oregon's interest is in tension with the *holding* of *Mathews* — that a hearing even in the administrative agency context is not required where it would result in some uncertain "administrative burden and other societal costs." 424 U.S. at 347.

C. The Precedential Implications of Honda's Argument Are Breathtaking

There is no limiting principle to Honda's argument. The "excessiveness" review it seeks is merely a species of weight-of-the-evidence review. Assessment of punitive damages, far from being a context where jury factfinding is closely constricted, has always been a subject peculiarly *within* the jury's domain. *See* pp. 38-39, 45-46, *supra*. And, unlike the binary question of liability, there is usually no single "correct" answer respecting the proper sum of damages in a personal injury or punitive damages case. Because there is an entire range of permissible awards, the jury should receive *greater* latitude, not *less*, when it comes to punitive damages.

Hence, Honda's argument that due process requires weight-of-the-evidence review would constitutionalize Fed. R. Civ. P. 59(a), Fed. R. Crim. P. 33 and similar state rules; would overturn prior decisions of this Court holding that there is no constitutional right to such weight-of-the-evidence review, *see* pp. 40-41, *supra*; would upset settled principles of federal administrative law that permit agency decisions adjudicating even "private rights" to be upheld on the basis of "substantial evidence" judicial review, *see St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51 (1935); *id.* at 84 (Brandeis, J., concurring); *Crowell v. Benson*, 285 U.S. 22, 63-65 (1932); and would invalidate virtually all verdicts by Oregon juries now on direct review, since Art. VII, § 3 applies to *all* facts found by Oregon juries, whether in civil, criminal, or even death penalty cases. *See State v. Montez*, 789 P.2d 1352, 1381 (Or. 1990); *State v. Wagner*, 752 P.2d 1136, 1171 (Or. 1988). Similarly, this Court would have to vacate all criminal convictions now on direct review from the States that do not have a weight-of-the-evidence standard

for judicial review of jury verdicts in criminal cases.[58] If weight-of-the-evidence review were to be constitutionally mandated in civil cases, *a fortiori* it would be required in criminal proceedings.

To avoid this plethora of practical absurdities this Court need only leave undisturbed the judgment below.

CONCLUSION

The judgment of the Oregon Supreme Court should be affirmed.

Respectfully submitted,

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[58] As this Court noted in *Hudson v. Louisiana*, *supra*, 450 U.S. at 44 n.5, the States currently differ on the policy issue of "[w]hether a state trial judge may assess evidence as a '13th juror.'" At least eight States other than Oregon appear to deny weight-of-the-evidence review in criminal cases. *See Ex Parte Nice*, 407 So.2d 874, 881-82 (Ala. 1981); *People v. Gennings*, 583 P.2d 908, 909 (Colo. 1978); *State v. Colombo*, 238 A.2d 806, 808 (Conn. 1967); *State v. Hall*, 662 P.2d 1306, 1309 (Mont. 1983); *State v. Brown*, 573 A.2d 886, 890 (N.J. 1990); *State v. Chavez*, 679 P.2d 804, 806 (N.M. 1984); *State v. Williams*, 634 P.2d 868, 872 (Wash. 1981); *Smith v. State*, 564 P.2d 1194, 1198 (Wyo. 1977). In light of *Hudson*, States which *do* permit weight-of-the-evidence review do so as a voluntary choice. *See In re Petition for Writ of Prohibition*, 539 A.2d 664, 680 & n.18 (Md. App. 1988).

No. 93-644

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In the Supreme Court of the United States

OCTOBER TERM, 1993

HONDA MOTOR CO., LTD.; HONDA R & D CO., LTD. AND AMERICAN HONDA MOTOR CO., INC.,

Petitioners

v.

KARL L. OBERG,

Respondent

On Writ of Certiorari to the Supreme Court of Oregon

HONDA'S MEMORANDUM IN RESPONSE TO OBERG'S POST-ARGUMENT MOTION AND BRIEF

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HONDA'S MEMORANDUM IN RESPONSE TO OBERG'S POST-ARGUMENT MOTION AND BRIEF

1. a. Honda wholeheartedly supports Oberg's motion for leave to file a post-argument brief calling the Court's attention to the recent decision of the Oregon Court of Appeals in *Tenold* v. *Weyerhauser Co.* The holding of *Tenold* is that Oregon's statutory cap on damages — which presumably would be binding in bench trials or in diversity cases tried in federal court — is an unconstitutional expansion of the power of Oregon courts under Article VII, §3, because it "reinstitutes the practice of courts reducing excessive jury awards." SA15. The decision unambiguously confirms Honda's submission that the Oregon courts are prohibited from correcting excessive damages verdicts, and we are frankly mystified by Oberg's bizarre suggestion to the contrary.

Oberg italicizes brief snippets of the *Tenold* opinion that he tenders as support for the proposition that "Article VII, §3 permits Oregon courts to ensure, even on post-trial review, that the amount of damages awarded by the jury is supported by legally sufficient evidence." Supp. Br. 1. But when the court refers to the possibility of setting aside a verdict because "no evidence supports it" (SA18; see also SA15), it plainly has in mind only the question whether the evidence supports *any* amount of damages, not whether it supports the amount awarded by the jury. The *Tenold* court thus emphatically explained that "the amendment [of Article VII, §3] was intended to prohibit courts from deciding that a jury's factual determination of the amount of damages is improper when measured against a statutory standard, such as 'excessive,' and nullifying the verdict." SA12. Elsewhere, the court stated that "the people chose to make jurors the exclusive judges of the facts regarding the extent of a plaintiff's damages." SA15.[1]

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[1] The Oregon courts are of course free to classify the question of the allowable amount of damages as one of "fact" for purposes of interpreting Article VII, § 3. But their classification does not control the federal due process question. Cf. *Carpenter* v. *Shaw*, 280 U.S. 363, 367-368 (1930). The question whether, in light of the relevant substantive law of damages (and taking the facts in the light most favorable to the verdict), a "verdict is in excess of an amount that would be regarded by all reasonable men as the maximum recovery justified by the evidence" -- the standard of review rejected in *Van Lom* as incompatible with Article VII, § 3 (210

As we explained in our reply brief (at 5), this is the only understanding of Oregon law that is consistent with *Van Lom*, where the defendant advanced precisely the position here espoused by Oberg: that Oregon courts "'have authority to grant a new trial if there is no evidence to support the verdict in its entirety, although there may be some substantial evidence that the plaintiff was damaged to some extent less than the amount of the verdict.'" 210 P.2d at 463. The Oregon Supreme Court flatly rejected this argument as "unsound" (*id.* at 464), observing that it would effectively return the Oregon courts to use of the "time-honored standards to which the courts have customarily adhered in passing on the question of whether a new trial should be granted for excessive damages" (*ibid.*) -- something that it unequivocally deemed prohibited by Article VII, § 3.

Oberg has failed entirely to come to grips with this dispositive holding, either at oral argument or in his post-argument brief.[2] It may be added that the proof of the pudding here is in Oregon's actual experience, for no Oregon court *ever* has set aside a verdict for punitive or unliquidated damages on the grounds advanced by Oberg in the 84 years since the amendment of Article VII, §3.

P.2d at 463-464) -- is one of law that is committed to the courts in our system of justice.

[2] Oberg renews (Supp. Br. 2 n.2) his assertion that the "no evidence" language of Article VII, § 3 has been interpreted by the Oregon courts to allow "substantial evidence" review. The problematical nature of this submission is shown by the fact that the decisions both in this case (Pet. App. 27a) and in *Tenold* (SA12-SA15, SA18, SA24, SA27) adhere consistently to the "no evidence" language.

In any event, this question is a red herring as concerns the issue now before this Court, because, as *Van Lom* makes clear, once *any* amount of damages is found to be permissible, the question whether the amount chosen by the jury is excessive is not reviewed even under the "no evidence" rubric. See also *Fowler* v. *Courtemanche*, 274 P.2d at 275 (review of punitive damages limited to existence of evidence to support finding of malice; if such evidence exists, verdict must be upheld "whether deemed excessive or not").

b. Oberg also contends (Supp. Br. 3-4 & nn. 3-5) that three pre-*Van Lom* decisions cited in *Tenold* — *Malpica* v. *Cannery Supply Co.*, 187 P. 596 (Or. 1920); *Sigel* v. *Portland Ry. Light & Power Co.*, 135 P. 866 (Or. 1913); and *Buchannan* v. *Lewis A. Hicks Co.*, 134 P. 1191 (Or. 1913) — support his position that Oregon provides review of the size of damages awards. But whether or not the out-of-context quotations from those opinions offered in his brief would have provided some arguable support to Oberg in 1913 or 1920, they are of no value after *Van Lom*. That is why the *Tenold* court cited the cases for quite a different proposition: that Article VII, §3 "was intended to *prohibit* courts from deciding that a jury's factual determination of the amount of damages is improper when measured against a statutory standard, such as 'excessive,' and nullifying the verdict." SA12 (emphasis added).

Indeed, in *Malpica* itself, a jury awarded the plaintiff $12,000 in a personal injury suit. The trial court found that "there was no evidence introduced upon the trial of this cause to justify a verdict for any greater sum than $2,000." See 187 P. at 597. Although this is the very circumstance in which Oberg contends that Oregon courts may reduce jury awards, the trial court instead stated that it was "of the opinion that, notwithstanding the aforesaid findings of fact, it has no power under the law to set aside said verdict and judgment or to require plaintiff to remit that part of the verdict and judgment herein entered in excess of $2,000 and denies the defendant's motion for a new trial." *Ibid.*

The Oregon Supreme Court affirmed. Although its opinion contained some language, cited by Oberg (Supp. Br. 3 n.4), describing the extent of the plaintiff's injuries, it is evident that the court was not engaging in any form of traditional excessiveness review and that the basis for its decision was lack of power to set aside the verdict. In this connection, we urge this Court to review the passages from the early opinions that are quoted in the *Tenold* decision (SA12-SA13), which, we submit, make clear the understanding of the Oregon courts (at least after *Van Lom*) that their review is limited to instructional errors and the existence of any evidence to support *some* award of damages.

2. Oberg is equally incorrect in contending (Supp. Br. 4), in a portion of his brief that appears to have little to do with *Tenold*, that *Van Lom* contemplates the availability of *pre*-verdict review in a case such as this one.[3] In *Van Lom*, the court noted that cases like *Lyons* v. *Browning*, 133 P.2d 599 (Or. 1943) (cited at Supp. Br. 4), stand for the proposition that a court may withhold the plaintiff's full request for damages from the jury when the case involves a "liquidated claim" and it is apparent from the face of the pleadings or from the undisputed evidence that the damages request is insupportable. 210 P.2d at 467. The court explained that in *Lyons* (where damages were awarded for the destruction of six turkeys when only four actually were destroyed) there are "separate and clearly distinguishable items of the claim to which separate and distinguishable items of evidence apply." *Id.* at 468. But the court also went on to hold that "[w]e think that no discussion is necessary to show that none of these cases tend in any way to support the proposition that either this court or the Circuit Court is authorized to declare that in a case like this" — where the plaintiff sought punitive and unliquidated compensatory damages — "the evidence does not support the verdict 'in its entirety' simply because the court thinks that the verdict is too large." *Id.* at 467. The court accordingly rejected the contention that "a verdict for unliquidated damages for a single wrong * * * can be split up by the court, as it were, into separate verdicts, one of them said to be supported by the evidence and the other to have no such support." *Id.* at 468.

Thus, while *Van Lom*'s discussion of *Lyons* may be taken to recognize a right of review of the giving or refusal of an instruction limiting the damages when the plaintiff's entitlement is to a specific, identifiable amount, nothing in *Van Lom* or *Tenold* remotely supports the radically different proposition that a defendant routinely is entitled under Oregon procedure to a pre-verdict determination of the maximum allowable amount of unliquidated or punitive damages. Again, the clearest evidence on this point is Oregon practice: there has been *no* decision in the years after *Van*

[3] The damages cap statute at issue in *Tenold* expressly precludes informing the jury of the cap (see ORS § 18.560(4)), so the option of handling the matter by jury instructions would seem to be unavailable in that context.

Lom (or, so far as we are aware, since the amendment of Article VII, §3), in which a court has confined the jury's consideration of a claim for unliquidated or punitive damages under the practice invented by Oberg.[4]

3. Finally, Oberg's contention (Supp. Br. 5) that Oregon should be deemed to have *no* law of excessiveness if jury awards are not subject to review (an argument that he did not make in his principal brief to this Court) is frivolous.[5] The jury in this case, after all, was instructed as to the factors that governed the exercise of its discretion in setting damages — factors that, in the words of the Oregon Supreme Court, "establish[] the substantive criteria to be considered by Oregon factfinders * * * in setting the amounts of [punitive] awards." Pet. App. 21a. Indeed, that court upheld the constitutionality of Oregon's system on the premise that those criteria were so detailed that they amounted to "definite and meaningful constraints * * * on the finder of fact." *Id.* at 25a. Oberg defended Oregon's system on the same theory. See Resp. Br. 19.

Where compensatory damages for pain and suffering are involved, for example, Oregon's substantive damages law is that damages should be in such amount as will reasonably compensate the plaintiff (see, *e.g.*, *Brizendine* v. *Visador Co.*, 305 F. Supp. 157, 163 (D. Or. 1969) (applying this standard in diversity case); that the court lacks power to correct a particular jury's verdict that

[4] It is no wonder that the Oregon courts have not adopted Oberg's burdensome and unworkable procedure. Apart from its utter impracticality, the procedure would defeat the purpose of the voters in adopting Article VII, § 3 to minimize retrials. If a defendant is entitled to have a court consider at the close of the evidence whether the amount demanded in the plaintiff's complaint exceeds the maximum amount permissible under the evidence, the court's decision whether, and if so to what extent, to grant that relief will be reviewable as instructional error on appeal at the behest of either party, leading to frequent retrials.

[5] Since Article VII, § 3 is concerned with factual determinations generally, and is not specifically directed at damages awards, it can hardly be the case that the provision was intended to displace Oregon's substantive law of damages.

is unreasonably high in relation to that objective hardly means that the award is not legally excessive. The same is true of punitive damages that are larger than necessary to serve the purposes justifying such penalties under Oregon law. An Oregon judge conducting a bench trial, after all, would have law to apply in setting a non-excessive punitive award, as would a federal judge reviewing a jury's verdict in a diversity case (see, *e.g.*, *Dias* v. *Sky Chefs, Inc.*, 919 F.2d 1370, 1376 (9th Cir. 1990) (reviewing punitive damages under substantive standards used by Oregon courts in FELA cases); that same law governs the jury's deliberations, although Article VII, § 3 has made the jury's error (unlike the judge's) not subject to judicial correction. Can Oberg really be arguing that a verdict of $5 *billion* in this case would not have been excessive under Oregon law just because there is no mechanism to set it aside?

Oberg's related contention (Supp. Br. 5) that because state law determines whether a property interest exists in the first place, a state's procedures for enforcing the right determine its substantive scope is nothing less than an effort to resuscitate the discredited "bitter with the sweet" theory of due process. See, *e.g.*, *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 541 (1985). The cases cited by Oberg stand only for the proposition that "[i]f the decisionmaker is not 'required to base its decisions on objective and detailed criteria,' but instead 'can deny the requested relief for any constitutionally permissible reason or for no reason at all,' * * * the State has not created a constitutionally protected * * * interest." *Olim* v. *Wakinekona*, 461 U.S. 238, 249 (1983), quoting *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U.S 458, 466-467 (1981). But here, of course, Oregon statutory law requires — as the court below held and as Oberg himself recognizes — that the jury base its decision on specific criteria. Due process mandates that Oregon provide a minimally fair method for determining that those criteria have been applied properly.[6]

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[6] We do not, of course, assert that Honda has a procedural due process right to a *correct* determination as to whether the award comports with the state substantive standards. We argue only that the state must make use of a procedural regime that appropriately minimizes the risk of error. Cf. *TXO*, 113 S. Ct. at 2727 (Scalia, J., concurring).

In sum, we strongly urge this Court to grant Oberg's motion and to read the *Tenold* decision carefully. That decision convincingly repudiates the distorted version of Oregon law that Oberg has propounded in his briefs and oral argument in an effort to persuade the Court not to reach the issue on which it granted review.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

HONDA MOTOR CO., LTD.; HONDA R & D CO., LTD. AND AMERICAN HONDA MOTOR CO., INC.,

Petitioners

v.

KARL L. OBERG,

Respondent

On Writ of Certiorari to the Supreme Court of Oregon

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Oberg has written at great length but has almost entirely failed to come to grips with Honda's arguments.[1] Instead, he engages in two diversionary tactics. The first concerns the nature of the excessiveness review provided by Oregon. This Court granted review, and Honda has briefed the case, on the understanding that no such review was available below. But with the filing of his brief on the merits, Oberg claims for the first time that Honda actually *did* get excessiveness review in the Oregon courts. As we show below, this contention is preposterous.

Oberg's second exercise in misdirection concerns the nature of Honda's argument. Throughout his brief, Oberg maintains that Honda has asserted a constitutional right to something he calls "weight-of-the-evidence" review, by which he evidently means a standard that would allow the judge to sit as a sort of "13th juror," setting aside verdicts whenever the judge would have come to a different conclusion had the case been tried without a jury. But that manifestly is *not* the nature of the review requested by Honda as a matter of constitutional right, and *nothing* in Honda's opening brief even remotely supports Oberg's mischaracterization. Instead, the "excessiveness review" that Honda believes is required by the Due Process Clause would "ascertain[] whether the evidence relied upon by the trier of fact was of sufficient quality and substantiality to support" the jury's verdict as a matter of law. *Santosky* v. *Kramer*, 455 U.S. 745, 757 (1982). Under such a standard, a court would remit or set aside an award that no reasonable jury could have found to be proper compensation or appropriate

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[1] Oberg's brief contains a lengthy factual statement that makes various assertions regarding the conduct that gave rise to liability and various claims of waiver with regard to the substantive merits of Honda's excessiveness challenge. These assertions are inaccurate in many important particulars, but because they are irrelevant to the legal issues before this Court we do not offer a detailed rebuttal.

punishment under the criteria established by state law. With this standard in mind, we proceed to address Oberg's contentions.[2]

A. Oregon Law Provides No Excessiveness Review

Our basic submission in this case is that Oregon's failure to provide judicial excessiveness review is unconstitutional. In response, Oberg argues at great length (Br. 24-38) that the Oregon courts *do* provide (and that Honda did in fact receive) just such review. This contention — which would doubtless astonish the many Oregon judges who have declared themselves powerless to correct excessive judgments — is plainly wrong.

1. As an initial matter, it should be noted that Oberg's current reading of Oregon law represents a complete about-face in his position. Until now, Oberg was of the view, as he put it to the Oregon Court of Appeals, that "neither the circuit court nor the appellate courts possess the power, after the constitutional amendment of 1910, to set aside or reexamine a jury verdict merely for excessiveness." CA Br. 37. Oberg specifically added that, while *Van Lom* left open the question whether an Oregon court may "review and set aside a verdict given under the influence of 'passion and prejudice,'" "the statutory basis for relief from a verdict for 'passion or prejudice' no longer exists." *Id.* at 38. Oberg took the same position in the state trial court and in the Oregon Supreme Court.[3]

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[2] Oberg asserts in a footnote to his summary of argument (Br. 12 n.13) that Honda has waived its challenge to the failure to review the size of the compensatory award. He also made this argument in opposing the petition; Honda explained in its reply (at 7-8) why the waiver argument is insubstantial, and this Court did not limit its grant of review. Accordingly, further discussion of the issue is unnecessary.

[3] See Plaintiff's Response to Defendants' Motions for New Trial and JNOV 43 (*Van Lom* "prevents the court from correcting an allegedly excessive verdict, unless the court can affirmatively say the verdict is supported by no evidence. Oregon Constitutional law on this point is well established and binding on this court."); Brief of Plaintiff-Respondent in Opposition to Petition for Review 11-14 (arguing that excessiveness review is not a requirement of due process). For its part, Honda expressly *acknowledged* before all three courts below that Oregon stands "in 'lonely eminence' among all jurisdictions as a result of [the Oregon Supreme Court's] holding that Article VII (amended), section 3, of the Oregon Constitution restricted the power of Oregon's trial and appellate courts to review and correct excessive verdicts" (Or. Sup. Ct. Pet. Rev. 11), and that the constitutional amendment "has rendered Oregon the only state where trial and appellate judges cannot correct runaway verdicts." *Id.* at 22-23. See Ct. App. Br. 40; Motion for New Trial 47-50. While Honda argued that the Oregon courts should abandon *Van Lom*, they obviously did not do so.

Oberg's brief opposing certiorari reiterated his position that excessiveness review is unavailable in Oregon. Thus, he explained that the Oregon Supreme Court "concluded that in light of the elaborate safeguards utilized to circumscribe and guide the jury's exercise of discretion in this case, *the constitutionally prescribed measure of judicial review in Oregon (ensuring that the jury was properly instructed and that there was evidence to support an award of punitive damages)* was adequate under the Due Process Clause." Br. in Opp. 9 (emphasis added). Oberg defended that decision on the ground that due process does not "require[] that State trial judges have the power to set aside jury verdicts arrived at after a fair trial" (*id.* at 16); he nowhere suggested that Oregon provides, or that Honda received, post-verdict excessiveness review.[4]

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[4] The only arguable ambiguity on this point concerns the question whether the court below reviewed the punitive award for federal constitutional excessiveness. Oberg did refer to the Oregon court's comparison of the punishment here with that in *Haslip* as an "implicit conclusion that the award here, like the *Haslip* award, is not constitutionally excessive." Br. in Opp. 12. At the same time, he correctly recognized that the court's holding rested on the view that in Oregon it is *procedural safeguards at trial* that "ensure that sufficiently definite and meaningful constraints are imposed on the jury which, in turn, ensures that an award of punitive damages bears a rational relationship to a defendant's conduct and the need for punishment and deterrence." *Id.* at 8. In the end, Oberg was unclear on whether he believed that the

It may be added that Oberg's *amici* the Oregon Trial Lawyers Association (OTLA) and the State of Oregon — both of which presumably have familiarity with Oregon law — continue to believe, as the State puts it, that "[a]n Oregon court * * * may not re-examine the damages the jury awarded to determine if, in the court's view, the award is excessive. The Oregon Constitution prohibits state courts from engaging in this form of judicial review * * * ." Oregon Am. Br. 2. See also *id.* at 4; OTLA Am. Br. 7.

2. In his brief on the merits in this Court, however, Oberg (now represented by new, non-Oregon counsel) has made the belated (but remarkably opportune) discovery that Oregon does provide excessiveness review after all. Indeed, Oberg now reports that Honda received *three* separate types of excessiveness review in the courts below: review to determine whether the evidence supported "the jury's measure of damages" (Br. 31-38); review to determine whether the size of the verdict reflected jury passion or prejudice (*id.* at 29-31); and review to determine whether the award comported with federal substantive due process standards. *Id.* at 25-27.[5] Oberg's failure to raise at least the first two of these points in his brief in opposition to the petition for certiorari makes it inappropriate for him to advance them now. See, *e.g.*, *Schiro* v. *Farley*, 114 S. Ct. 783, 788-789

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court below had the power to review an award for conformity with federal substantive due process guarantees.

[5] Oberg is correct in one respect: Oregon appellate courts may adjust damages in cases of trial error. Br. 28. As we already have explained, however (see Honda Br. 30-31 n.23), this fact is entirely irrelevant here because no relief is available where the only legal error relates to the excessiveness of the amount awarded. See, *e.g.*, *Fowler* v. *Courtemanche*, 274 P.2d 258, 275 (Or. 1954) ("we are without power to consider whether or not the punitive damages were excessive, and we must uphold the verdict whether deemed excessive or not, *unless we find other error authorizing the granting of a new trial*") (emphasis added).

(1994). But more fundamentally, his argument cannot be squared with even the most cursory reading of Oregon law.

a. Oberg contends that Oregon courts "have the power to review damages awards to determine whether there is substantial evidence to support the jury's *measure of damages*." Br. 31 (emphasis added). By this he evidently means that an Oregon court in a case such as this one may review the evidence and determine whether it supports a $5 million punitive award; if the court finds that no reasonable jury could return such an award, it will reduce the verdict to the amount that a jury reasonably could return. See *id.* at 32-33. Were Oberg correct in this assertion, Oregon's system would not differ significantly from that used by the other 49 states. And that is indeed Oberg's avowed position: he declares that Oregon does *not* "stand[] alone among the States." Br. 17 n.17.

Oberg's account of the Oregon system, however, is the purest fiction. As we have explained (see Honda Br. 17), the Oregon Supreme Court itself has acknowledged the State's "lonely eminence" in denying excessiveness review. Indeed, *Van Lom* expressly rejected the proposition that review of the sort now suggested by Oberg is available in Oregon:

> The argument is made that the circuit courts "have authority to grant a new trial if there is no evidence to support the verdict in its entirety, although there may be some substantial evidence that the plaintiff was damaged to some extent less than the amount of the verdict". This may be done, it is said, where "the verdict is in excess of an amount that would be regarded by all reasonable men as the maximum recovery justified by the evidence." When the conclusion is reached that the verdict is to that extent excessive, the argument proceeds, the court "can affirmatively say there is no evidence to support the verdict" and no violence is done to the Constitution. * * *
>
> We think the argument is unsound. It is in reality only a formula under which the courts would in prac-

> tice do the very thing which they were accustomed to do before Art. VII, § 3, was adopted.

Van Lom, 210 P.2d at 463-464 (footnote omitted). Accord, *e.g.*, *Foley* v. *Pittenger*, 503 P.2d 476, 477 (Or. 1972).[6]

Oberg contends that these statements in *Van Lom* were intended simply to reject what he labels "weight-of-the-evidence" excessiveness review. See Br. 35 & n.41. As explained in our opening brief (at 3), however, *Van Lom* read the amendment of Article VII, § 3, to take from courts their pre-existing authority to set aside verdicts that were "'palpably or outrageously excessive,'" "'unreasonable or outrageous,'" so large "'as to strike every one with [their] enormity and injustice,'" or that "'no twelve men could reasonably have given.'" *Van Lom*, 210 P.2d at 464 (citations omitted). The constitutional amendment thus goes well beyond preventing the Oregon courts from, as Oberg derisively puts it, "vacat[ing] awards based on their subjective views about 'excessiveness.'" Br. 35 n.41. The Court need only read *Van Lom* to see how far Oberg's recitation of Oregon law departs from reality.[7]

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[6] Oberg asserts (Br. 35) that *Van Lom*'s discussion of the power of Oregon trial courts was dictum that should be disregarded by this Court. In fact, however, the Oregon Supreme Court had specifically requested briefing on the question whether Article VII, § 3 stripped state trial courts of their power to engage in excessiveness review (see *Van Lom*, 210 P.2d at 463); the court addressed the issue at great length (see *id.* at 463-465) because, as it explained, "the first sentence of Art. VII, § 3, applies both to the Circuit Court and to this court" (*id.* at 463); and its conclusion that all courts in Oregon had been denied powers of review plainly was the holding of the case. Oberg also makes the related contention (at Br. 36) that the *Van Lom* court, in declaring itself powerless to set aside an excessive verdict, was referring only to the traditional limits on powers of appellate review. That contention is so blatantly inconsistent with *Van Lom*'s reasoning (see 210 P.2d at 462) that specific refutation is unnecessary.

[7] In arguing that review of the size of a verdict is available, Oberg cites the Oregon Court of Appeals' opinion in *Roberti's House of*

Oberg makes a related claim (Br. 36-38) that Honda could have received the same kind of protection it seeks here *before* the case was sent to the jury. According to Oberg, Honda could simply have asked the trial judge to determine, as a matter of law, the maximum amounts of economic, non-economic, and punitive damages that the evidence would justify. Under this hypothetical procedure, litigants would be required to make, and judges to rule upon, protective motions in *every* case (without knowing whether a large award ultimately would be returned or even whether a finding of liability will be made). Moreover, in the many cases involving multiple causes of action, such an inquiry would be a practical impossibility because the trial judge would not yet know the causes of action upon which the defendant will be found liable (if any). Not surprisingly, Oberg fails to cite a single case in which a court has utilized such a procedure when punitive or non-economic damages were at issue. The fact that no court or commentator ever has suggested this cumbersome, inefficient, and, in many instances, unworkable procedure as a substitute for the deeply entrenched, universal safeguard of post-verdict review is strong evidence that it does not in fact exist and is merely one more post hoc argument concocted by Oberg's Supreme Court counsel in an effort to avoid the merits of Honda's claim.

b. Oberg also argues that Honda received "passion-or-prejudice" review (Br. 29-31), by which he evidently means that the courts below were free to set aside the verdicts had they

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Wines, Inc. v. *Somerset Wine Co.*, 703 P.2d 976, 979 (Or. Ct. App. 1985). (The opinion is miscited by Oberg as a decision of the Oregon Supreme Court.) The court acknowledged, however, that "[w]e may affirm the grant of a new trial only if we 'can affirmatively say that there was no evidence to support the verdict.'" *Id.* at 978 (citation omitted). Applying this principle, the court granted a new trial because the jury's award was premised on a mathematical miscalculation, so that there effectively was no evidence to support particular elements of the judgment. See *id.* at 979-980. That holding has no application in cases such as this one. The other decisions cited by Oberg on this point (at Br. 32-33 n.37) all *affirmed* damages awards.

believed their size to evidence passion or prejudice. See *id.* at 29. In fact, it is not likely that passion-or-prejudice review of any sort is permitted in Oregon. *Van Lom* noted "previous decisions" that the Oregon courts' power to engage in such review had been removed by Article VII, § 3, although it expressed no opinion on whether it would "adhere" to those decisions in the future. 210 P.2d at 468. Subsequent cases have expressed doubt that such review is available. *E.g.*, *Trenery* v. *Score*, 609 P.2d 388, 389-390 (Or. Ct. App. 1980). Oberg has cited no post-*Van Lom* case, and we are aware of none, in which an Oregon verdict has been set aside on passion-or-prejudice grounds.[8]

Even if passion-or-prejudice review were available, the scope of that review would be far narrower than Oberg suggests. Oberg asserts (Br. 30 n.33) that passion-or-prejudice review in Oregon is identical to "the very common-law test that Honda claims to advocate." That is true in other states, where "passion-or-prejudice" is a verbal fiction that has long been used to justify setting aside an excessive jury award: when the verdict is too large to be rationally explained, courts have presumed it to be the product of passion or prejudice. See, *e.g.*, *Wells Fargo Armored Serv. Corp.* v. *Turner*, 543 So. 2d 154, 158-159 (Miss. 1989); *Sizemore* v. *Hoskins*, 235 S.W.2d 1011, 1014 (Ky. Ct. App. 1951). But that is manifestly *not* the post-amendment test in Oregon, where it is quite clear that "a trial court is precluded from awarding a new trial on the ground that the mere size of a verdict is sufficient to establish that it was given under passion and prejudice." *Lane* v. *Stewart*, 351 P.2d 73, 80 (Or. 1960). Instead, passion or prejudice may be found in Oregon (if at all) only if some irregularity in the proceedings

[8] For the proposition that such review is available, Oberg relies (Br. 29 n.32) on the opinion of Justice McBride in *Donaghy* v. *Oregon-Washington R. & Nav. Co.*, 288 P. 1003, 1014 (Or. 1930). Oberg fails to note that Justice McBride was "speaking for himself and not for the court." *Ibid.*

tainted the jury's decision.[9] Were it otherwise, Oregon would not occupy what its Supreme Court has described as a "lonely eminence" in the restrictiveness of its review.

This proposition is settled by an Oregon statutory amendment that is noted by Oberg himself (at Br. 29-30 n.32). Prior to 1979, passion-or-prejudice review was available in Oregon (if at all) pursuant to ORS 17.610(5). In 1979, that provision (along with other statutes governing trial procedure) was replaced by the Oregon Rules of Civil Procedure, which in relevant part permit a new trial only in cases of jury "[m]isconduct" or any "[i]rregularity in the proceedings of the court, jury or adverse party." ORCP 64B(1), (2). A leading treatise on Oregon procedure explains that the provision permitting a new trial if damages were so high as to evidence passion or prejudice "was eliminated by the 1979 Legislature because it probably conflicted with the right to trial by jury in the Oregon Constitution." L. Kloppenberg, OREGON RULES OF CIVIL PROCEDURE: 1994 HANDBOOK 182 (1994). The Legislature's focus on juror misconduct and its elimination of any reference to passion-or-prejudice review confirms that excessiveness of the verdict (no matter how denominated) is *not* a ground for a new trial in Oregon.

Oberg nevertheless contends (Br. 30) that Honda *did* receive passion-or-prejudice review in the trial court. He supports this

[9] See *Fowler* v. *Courtemanche*, 274 P.2d 258, 275 (Or. 1954) ("we are without power to consider whether or not the punitive damages were excessive, and we must uphold the verdict whether deemed excessive or not, *unless we find other error authorizing the granting of a new trial*") (emphasis added); *Timmins* v. *Hale*, 256 P. 770, 776 (Or. 1927) ("since there is nothing in the record showing any misconduct on the part of the jury, it was not proper for the court to set aside the judgment on the ground that the damages were excessive"); *Trenery*, 609 P.2d at 390 ("[W]e conclude that defendant has not established that the verdict was influenced by passion or prejudice. The only basis offered by defendant for a new trial is that the verdict was excessive in relation to plaintiff's injuries. *This is not sufficient.*") (emphasis added).

argument by asserting that Honda asked the court to provide such review, that Oberg answered Honda's claim on the merits, and that the court proceeded to deny Honda's request without opinion. But Oberg expressly did *not* concede that passion-or-prejudice review was available in the trial court. See Plaintiff's Response to Defendant's Motions for New Trial and JNOV 45. And the only logical assumption about the trial court's unexplicated decision is that the court followed controlling Oregon law by declining to review the size of the judgment.

c. Finally, Oberg contends (Br. 25-27) that the court below reviewed the judgment to determine whether it was excessive under federal substantive due process standards. He asserts that the court "recognized its duty to 'ensure that an award of punitive damages ... bears a rational relationship to a defendant's conduct and to the need for punishment and deterrence.'" *Id.* at 25-26, quoting Pet. App. 28a. But this quotation is misleadingly pulled out of context. The opinion below addressed the procedural safeguards available in Oregon. The court outlined those safeguards (which do not include excessiveness review) and opined that "*[t]hose procedural protections*, in turn, ensure that an award of punitive damages" is adequately related to the policies of punishment and deterrence. *Id.* at 28a (emphasis added). While it observed in a footnote that the ratio of punitive to compensatory damages in this case was similar to that in *Haslip* (see *id.* at 29a n.14), the court nowhere indicated that it had engaged in any independent excessiveness review. To the contrary, had it thought itself to be providing substantive excessiveness review, it would have had no cause to state that it did "*not* interpret *Haslip* to hold that an award of punitive damages, to comport with the requirements of the Due Process Clause, always must be subject to a form of post-verdict or appellate review that includes the possibility of remittitur." *Id.* at 25a (emphasis added).[10]

[10] This understanding is confirmed by the decision in *Eulrich* v. *Snap-On Tools Corp.*, 853 P.2d 1350 (Or. Ct. App.), rev. denied, 859 P.2d 540 (Or. 1993), cert. pending, No. 93-697. There, the Oregon Court of Appeals relied on the holding below without considering the defendants' assertion (see No. 93-697, Pet. App. A-53) that the $9 million punitive award violated substantive due process. See 853 P.2d at 1362.

In any event, Oberg is incorrect in contending (Br. 27) that *substantive* due process review would satisfy Honda's *procedural* due process rights. As we explained in our opening brief (at 27 n.18), the Due Process Clause requires that the states make use of procedures that minimize departures from the *state-law* standards that authorize deprivations of liberty or property. Excessiveness review under the federal constitutional standard does not serve that purpose. Oberg offers no response to this point.

d. In sum, it is plain that Oregon law does not provide, and Honda did not receive, any form of excessiveness review. But if Oberg has been able to generate doubts on that score, he should not be allowed to benefit from his shell game. Given Oberg's failure at the certiorari stage to make the arguments he now advances, the Court should presume that Honda did not receive excessiveness review and should answer the question presented in the petition. See *Michigan* v. *Long*, 463 U.S. 1032, 1041-1042 (1983). If Oberg is correct and excessiveness review already has been provided, the point will quickly be settled on remand from this Court's decision. But if Honda has not received any such review (as we think plainly is the case), it should not be deprived of an answer to the question upon which certiorari was granted — and of the excessiveness review to which it is entitled by the Due Process Clause — because of Oberg's calculated and cynical efforts to obscure Oregon law.

B. Judicial Excessiveness Review Is Required By The Due Process Clause

Oberg's visibly strained effort to find some basis for avoiding the merits stands as a tacit admission that he has little persuasive to say about the constitutional question on which the Court granted review. His argument on the merits — parts of

which we frankly find obscure — appears to consist of three contentions: that states may vest unreviewable decisionmaking authority in pretty much anyone (Br. 20-24); that judicial review of jury verdicts historically was not provided anywhere (*id.* at 38-39); and that the Oregon system is constitutional under the test of *Mathews* v. *Eldridge* (*id.* at 39-50).[11] We imagine that this argument will come as something of a revelation to the five Justices who *expressly* concluded last Term in *TXO* that "'procedural due process' requires judicial review of punitive damages awards for reasonableness." 113 S. Ct. at 2727 (Scalia, J., joined by Thomas, J.) (also observing that same is true with respect to compensatory damages). See *id.* at 2742 (O'Connor, J., joined by White and Souter, JJ.). See also Honda Br. 37-38 (explaining that same conclusion is implicit in plurality opinion). Not surprisingly, Oberg's submissions are insupportable.

1. Oberg contends (Br. 20) that "due process has never been thought to preclude Congress and the States from vesting final decisionmaking authority over particular issues (especially factual ones) in juries and other non-judicial decisionmakers." He advances four points in support of this assertion: that at one time juries "had the power to decide questions of both law and fact" (*id.* at 21); that "[t]his Court has upheld capital punishment schemes vesting final authority in the jury to decide whether to impose the death penalty" (*id.* at 22); that administrative agencies may be given unreviewable discretion to decide certain issues (*id.* at 23-24); and that there really is no such thing as a

[11] Oberg also contends (Br. 18-20) that the Oregon system is rendered fundamentally fair by what he describes as "extensive pre-verdict protections for defendants." Only two of these protections, however, relate to the size of a punitive judgment. The first is that the award is limited by the amount that *the plaintiff himself requests* in his complaint (*id.* at 18), which is hardly the sort of limitation that will help defendants sleep soundly. The second involves what Oberg calls "detailed" jury instructions. *Id.* at 19. In fact, as we explained in our opening brief (at 32-33), the instructions in this case did *not* serve as a meaningful check on the jury's discretion. Oberg offers *no* response to that argument.

state judge for constitutional purposes anyway, because "a State could have a neutral layperson * * * perform the function of reviewing punitive damage awards for excessiveness" (*id.* at 20-21).

For the most part, these points are clearly wrong even on their own terms.[12] More fundamentally, however, taken to its

[12] This Court has not, for example, "upheld capital punishment schemes vesting final authority in the jury to decide whether to impose the death penalty" (Oberg Br. 22); the various schemes cited by Oberg all provided for extensive appellate review. See *Gregg* v. *Georgia*, 428 U.S. 153, 161 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); *Jurek* v. *Texas*, 428 U.S. 262, 268 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); *Boyde* v. *California*, 494 U.S. 370, 375 (1990); *Commonwealth* v. *Blystone*, 549 A.2d 81, 93 (Pa. 1988). And Oberg's assertion that "[t]his Court has already declined to review a judgment affirming the application of Art. VII, § 3 to death penalty cases" (Br. 22 n.23) is a grotesque distortion. It is true that the Oregon Supreme Court upheld such an application of the provision in *State* v. *Wagner*, 752 P.2d 1136 (Or. 1988). But this Court vacated the decision for reconsideration in light of an intervening case. 492 U.S. 302 (1989). On remand, the death penalty was *vacated*. 786 P.2d 93 (Or. 1990). The Court subsequently denied *Oregon's* petition for certiorari from the vacatur of the death sentence. 498 U.S. 879 (1990). This history hardly can be read as "declin[ing] to review a judgment affirming application of Art. VII, § 3."

The hoary decisions permitting juries to be told that they were judges of law as well as fact (cited at Oberg Br. 21-22 & n.21) authorized a form of jury nullification that acted as a safeguard in cases involving unjust criminal prosecution or other forms of official oppression. They cannot be read to validate the power of a jury *itself* to act as an oppressor by taking property arbitrarily.

The hodgepodge of other decisions cited by Oberg at Br. 20-24 are simply off the point. Thus, *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959), had nothing to do with the denial of judicial review. In *Stein* v. *New York*, 346 U.S. 156 (1943), which involved the question whether the jury could be permitted to judge the voluntariness of a confession, appellate review was permitted — and even so, *Jackson* v. *Denno*, 378 U.S. 368 (1964), held that the coercion question could not

logical conclusion, Oberg's submission means that a state could select a single lay decisionmaker for the purpose of resolving an individual case, tell her that she is the sole judge of the law and the facts, and allow her — applying whatever she deems the law to be — to sentence a defendant to death, all without any possibility of judicial review at any point. This line of argument departs so radically from basic concepts of fairness that we cannot believe that Oberg's eminent counsel advance it seriously.

In fact, the question in a case such as this one is whether the decisionmaking process used by the state to deprive the defendant of property is fundamentally fair. Historical practice bears on this; so do the considerations articulated in *Mathews* v. *Eldridge*. All of these factors establish the unconstitutionality of the Oregon system, as we explain below.

2. Oberg (Br. 38-39) and his *amici* of self-styled "Legal Historians" maintain that excessiveness review was not available at common law. They fail to note that this Court already has concluded to the contrary, recognizing that "[u]nder the traditional common-law approach" the "jury's determination [of

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be presented to the jury unless there was a prior judicial determination of voluntariness. In *Chicago, R. I. & P. Ry.* v. *Cole*, 251 U.S. 54 (1919), the Court held that because the state did not have to permit a defense of contributory negligence at all, it was free to make the jury's factual determinations regarding that defense unreviewable — an observation that has no application to a situation, like the one here, where the state, far from creating a defense, has made available a potentially boundless area of *liability*. In any event, the decision in *Cole* (which has not been cited by this Court for any proposition since 1932) was premised on the view that the defendant "cannot complain that its chance to prevail upon a certain ground is diminished when the ground might have been altogether removed" (*id.* at 56), a form of "bitter with the sweet" due process analysis that has since been soundly rejected by this Court. See, *e.g.*, *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). Space unfortunately does not permit us to offer a detailed distinction of the other decisions cited by Oberg, none of which even remotely supports his argument.

damages] is * * * reviewed by trial and appellate courts to ensure that it is reasonable." *Haslip*, 499 U.S. at 15. See *TXO*, 113 S. Ct. at 2726 (Scalia, J., concurring in the judgment); *id.* at 2729-2730 (O'Connor, J., concurring in the judgment). The Court was correct; Oberg and his *amici* are not.

In arguing that excessiveness review was unavailable in 18th century England, Oberg and his *amici* rely almost entirely on *Beardmore* v. *Carrington*, 95 Eng. Rep. 790 (C.P. 1764).[13] Oberg Br. 38-39. *Beardmore* does contain the statement that "there is not one single case (that is law) in all the books to be found, where the Court has granted a new trial for excessive damages in actions for torts." 95 Eng. Rep. at 793. Curiously, however, the *Beardmore* court had just identified *Chambers* v. *Robinson*, 93 Eng. Rep. 787 (K.B. 1726), as precisely such a case; in addition, the *Beardmore* court observed that "it is said in an hundred cases in the books that an attaint does lie" "for excessive damages" in tort cases. 95 Eng. Rep. at 792-793. And most important for present purposes, the court expressly recognized that manifestly excessive damages could be set aside. *Id.* at 793. As we have explained (Honda Br. 14 & n.9), that principle was recognized repeatedly in England prior to American independence. See, *e.g.*, *Gilbert* v. *Burtenshaw*, 98 Eng. Rep. 1059, 1060 (K.B. 1774) (Mansfield, J.); *Fabrigas* v. *Mostyn*, 96 Eng. Rep. 549 (K.B. 1774).

As for 19th century American practice, Oberg (Br. 39) and his "Legal Historians" (Br. 15-17) *acknowledge* that passion or prejudice review was generally available — which meant then, as it still does in many states, that an award would be set aside if larger than rationally justified by the evidence in the case.

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[13] Oberg and his *amici* entirely fail to respond to our demonstration (Honda Br. 12-13 & nn. 7, 8) that early English courts exercised a variety of informal controls over juries and that the courts' power to grant new trials when verdicts were returned against the weight of the evidence had been established dispositively by the mid-18th century. As we noted, those propositions have been endorsed by Holdsworth, Plucknett, and other leading historians of the period.

See, *e.g.*, D. Graham, A TREATISE ON THE LAW OF NEW TRIALS IN CASES CIVIL AND CRIMINAL 452 (1st ed. 1834) (new trials granted when "*the result* of the deliberations of the jury appears in a form calculated to shock the understanding, and impress no dubious conviction of their prejudice and passion") (emphasis added); T. Sedgwick, A TREATISE ON THE MEASURE OF DAMAGES 533 (1868) (new trial where "verdict is so extravagant as to bear evident marks of prejudice, passion, or corruption"); 3 J.G. Sutherland, A TREATISE ON THE LAW OF DAMAGES 469 (1883) (new trial when damages "so exorbitant as to indicate that they have been influenced by passion, prejudice or a perverted judgment"). True, courts early on in both England and this country were reluctant to interfere with jury verdicts, and would do so only when damages awards were demonstrably excessive. But courts plainly *would* provide a remedy in such cases. Against this background, Oregon's conceded failure to do so — even when the judgment is one that "'no twelve men could reasonably have given'" (*Van Lom*, 210 P.2d at 464 (citation omitted)) — is unconstitutional. See Honda Br. 17.

3. Oberg's application of the *Mathews* test is tainted by the same error that infects the rest of his brief: the patently false premise that Honda seeks "weight-of-the-evidence" review. In any event, Oberg's analysis of the particular elements of the *Mathews* standard is unsound.[14]

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[14] Oberg suggests (Br. 40-42) that *Mathews* does not apply in this case because the jury's role as "an instrument of self-government" is more important than the "humdrum bureaucracy involved in *Mathews*." Here again, Oberg mischaracterizes our arguments. We do not attack the jury system as a whole; we contend only that a particular safeguard is necessary to correct errors that otherwise would be caused by a particular defect in the jury process. There is nothing novel in that. This Court has held on a number of occasions that due process requires the imposition of particular constraints on the operation of juries. See, *e.g.*, *Jackson* v. *Denno*, supra.

a. So far as the private interest here is concerned, Oberg does not deny either that the amounts at stake in a case such as this one may be enormous or that the award of a large punitive verdict may impose a significant stigma on the defendant. See Oberg Br. 42. His argument that this stigma is irrelevant because punitive damages are "quasi-criminal" and *Mathews* is not used to assess procedures that are part of the state criminal process (Br. 42 n.51) is so manifestly untenable as to require no discussion beyond noting that this is not a criminal case.

b. Oberg's argument on the question whether Oregon's system is likely to lead to erroneous deprivations of property is directed at a caricature of Honda's position. We obviously do not assert that the jury system is bankrupt and that most jurors are credulous simpletons.[15] But however manifest the jury's value as a finder of facts and a bulwark against tyranny, the jury does have notable limitations that are of particular significance when it comes to the award of punitive and other unliquidated damages. As we explained in our opening brief (at 22-26, 31-32), individual jurors have no experience in setting judicial punishments and therefore operate entirely without a frame of reference in awarding punitive damages; because they deliberate in secrecy and render a verdict without explanation, juries operate without either accountability or external constraints; and juries plainly may be influenced by improper criteria, such as the defendant's nationality or wealth. Oberg makes *no* response to any of these points.

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[15] Although Oberg (Br. 40-41) omits internal quotation marks and attributes the sentiments to Honda, it was Judge Jerome Frank who believed that "the jury applies law it doesn't understand to facts it can't get straight" and Mark Twain who observed that the jury system is "worthless" and places a premium on "ignorance." See Honda Br. 22 n.16. Oberg also labels "remarkable" Honda's supposed statement that jurors are "untrained" (the observation actually was made by Michael Saks), but it is hard to see why he believes that comment to be controversial.

Instead, Oberg largely confines his argument to the assertion that "the social science evidence does not bear out Honda's claim." Br. 43 (footnote omitted). But we hardly need social science to establish our point: this Court itself has recognized the risk of jury bias against out-of-state corporate defendants (see Honda Br. 25-26), and most of our other observations are grounded in common sense. It may be added, however, that Oberg's discussion of the social science literature is yet another exercise in misdirection. While Oberg asserts that the "materials cited by Honda do not support its argument" (Br. 44 n.52), he fails to discuss many of the sources cited in Honda's opening brief. In particular, Oberg does not, and plainly could not, refute the nearly unanimous view of researchers that juries often do not understand their instructions. See Honda Br. 31-32 & n.24. As for the sources he does address, Oberg limits himself to proffering brief snippets from each in praise of various aspects of the jury system. See Oberg Br. 43-45 n.52. That is simply not responsive to the specific criticisms leveled by these authorities.

Finally, Oberg asserts that "Honda's definition of [jury] 'error' is fatally flawed" because "[t]here simply is no basis for Honda's claim that 'error' occurs any time a judge would find that an award was contrary to the weight of the evidence." Br. 42. Once again, we are constrained to note that this is *not* Honda's contention. Instead, as we explained in our opening brief (at 26-27), a verdict would work an unlawful deprivation of property if it exceeds any amount that could reasonably be thought to serve the purposes authorized by state law. Procedural due process entitles a defendant to a judicial determination whether such an error has occurred.

Moreover, although they quibble with some of the specifics of Honda's empirical data (see Oberg Br. 42-43), neither Oberg nor his *amici* deny that such reversals occur with substantial frequency. They plainly could not; as we noted in our opening brief (at 29 n.21), the "peer-review[ed]" study hailed by Oberg's *amicus* Trial Lawyers for Public Justice (TLPJ) (see Br. 9, citing Rustad, *In Defense of Punitive Damages in Products*

Liability: Testing Tort Anecdotes With Empirical Data, 78 Iowa L. Rev. 1 (1992)) as "comprehensive and authoritative"[16] *itself* demonstrates that such reversals often occur.[17]

As for Oberg's argument (Br. 45-46) that the judgment of history establishes the jury's suitability to award damages, the short answer is that judicial review historically has been recognized as a necessary accompanying safeguard. And while we certainly agree that judicial excessiveness review under the common law standard is not a "panacea" (*id.* at 48), it goes at least some of the way towards minimizing jury errors. TLPJ's "authoritative" article, like the brief filed by ATLA in *TXO* (see

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[16] We assume that the "peer review" noted by TLPJ refers to the student law review editors who accepted the article for publication. We also note that the data in the article were developed with the financial assistance of the Roscoe Pound Foundation (see 78 Iowa L. Rev. at 1 n.*), which is operated under the auspices of Oberg's *amicus*, the American Trial Lawyers Association (ATLA). As for Honda's empirical study, TLPJ asserts (at Br. App. A) that Honda miscited 13 cases. Even assuming that TLPJ is correct in its characterization of the cases, only <u>one</u> of the decisions TLPJ points to was included on Honda's list of cases granting remittiturs; <u>12</u> were included on Honda's list of cases in which excessiveness challenges were rejected. TLPJ's correction therefore increases from approximately 28% to approximately 30% the percentage of cases in which excessiveness claims were granted.

[17] Oberg and his *amici* contend that the relevant empirical question is whether punitive awards in Oregon are, on average, smaller than in other states, and they assert that Oregon awards historically have been on the low side. See Oberg Br. 19. In fact, recent seven-figure punitive awards in Oregon (in addition to the judgment in this case and those cited at Honda Br. 21, see *Lakin* v. *Senco Prods., Inc.*, No. A9211-07901 (Or. Cir. Ct. Feb. 4, 1994) ($4 million punitive award in product liability action)) suggest that the trend towards astronomical judgments long visible in other states has now reached Oregon with a vengeance. In any event, the fact (if it is a fact) that relatively few other people are suffering unlawful deprivations of property is cold comfort to a defendant who is.

Honda Br. 30 n.22), therefore observed that "punitive damages are appropriately kept in check by judicial controls." Rustad, *supra*, at 58. All that has changed since ATLA and Rustad last wrote on the subject is the self-interest of the plaintiff they support.

c. Addressing Oregon's interest, Oberg asserts (Br. 48) that Honda disregards the importance to the State of having damages awarded by persons who (apparently unlike judges) have a "connection with ordinary life."[18] That, however, was not the justification for the amendment of Article VII, § 3, which was intended simply to avoid the expense of retrials. See Honda Br. 34. Oberg offers *no* response to our submission (see Honda Br. 33-35) that providing excessiveness review will impose no substantial burden on Oregon and that, in the circumstances of this case, the State's interest in economy cannot justify its failure to provide procedures reasonably likely to correct erroneous deprivations of property.

d. Finally, Oberg's hyperbolic argument (Br. 49-50) that Honda's position would constitutionalize Fed. R. Civ. P. 59(a) and Fed. R. Crim. P. 33, require judges in all cases to sit as "thirteenth jurors," and otherwise lead to the quick demise of the Republic is — yes, again — premised on a "breathtaking" (Oberg Br. 49) misstatement of Honda's position. We do not ask the Court to constitutionalize "weight-of-the-evidence" review; we contend, instead, that judges must determine whether an award is so large that it transgresses the state-law constraints on compensatory and punitive judgments. The Court *already* has indicated in *TXO* that such review is mandated by the Due Process Clause, and Oberg has done nothing to call that conclusion into question.

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[18] We note that this supposed state interest seems quite inconsistent with the various subterfuges for circumventing Article VII, § 3 that Oberg hypothesizes at Br. 33-38.

CONCLUSION

The judgment of the Supreme Court of Oregon should be reversed.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1993

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD.; AND AMERICAN HONDA MOTOR CO., INC.,

Petitioners,

v.

KARL L. OBERG,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Oregon

BRIEF OF *AMICI CURIAE* SNAP-ON TOOLS CORPORATION, TIM KASH, AND RAY PARK IN SUPPORT OF PETITIONERS

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Oberg v. Honda Motor Co., 851 P.2d 1084 (Or. 1993) *passim*

TXO Production Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993) 2, 3, 4

Van Lom v. Schneiderman, 210 P.2d 461 (Or. 1949) ...4, 5

INTEREST OF THE *AMICI CURIAE*

Amici curiae Snap-on Tools Corporation, Tim Kash and Ray Park (the "Snap-on *amici*") support Petitioners, Honda Motor Co., *et al.* ("Honda"), and request the Court to hold that Oregon's refusal to conduct post-trial review to determine whether a jury's punitive damages award is excessive is a violation of due process of law.[1]

Shortly after Honda's petition for writ of certiorari was filed, these *amici* also filed a petition, *Snap-on Tools Corp., et al. v. Dan Eulrich, et al.*, No. 93-697, from another Oregon ruling in a non-products liability case, raising the same due process issue involving punitive damages as Honda. The Court has not yet taken action on the Snap-on *amici's* petition.

Snap-on is a manufacturer of high quality tools sold primarily through authorized dealers to professional mechanics. Park and Kash were managerial employees at Snap-on's Portland, Oregon branch. A former Snap-on dealer, Dan Eulrich, and his wife sued the Snap-on *amici* in Oregon state court for economic loss due to Eulrich's failed dealership under theories of fraud in the inducement of the dealership and tortious breach of the implied covenant of good faith. As to punitive damages, the jury was only instructed that it had the discretion to set the amount and that, in doing so, it "may" consider four factors: "the character of defendants' conduct"; "defendants' motive"; "the sum of money that would be required to discourage the defendants and others from

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[1] The written consent of the parties to allow this brief has been filed with the Clerk.

engaging in such conduct in the future"; and the "income and assets of the defendant."

According to Eulrich's own proof, he suffered approximately $10,000 in out-of-pocket loss. The jury awarded $100,000 in compensatory damages. On the fraud count, the jury awarded $4.75 million in punitive damages, jointly and severally, against Snap-on, Park, and Kash. Snap-on, a Fortune 500 Company, earns about $85 million annually. There was no evidence that Park and Kash were anything but individual wage earners. On the bad faith count, to which only Snap-on was a defendant, the jury awarded $3.7 million in punitive damages, which, under the instructions, was based on at least the same evidence as the fraud count. The court combined the punitive damages awards for a total of $8.45 million against Snap-on.

The Snap-on *amici* timely moved to set aside the awards as excessive and challenged the constitutionality of Oregon's rule against allowing a hearing on the issue. The trial court refused to hear whether the awards were excessive. While the *Snap-on* case was pending on appeal, the Oregon Supreme Court ruled in *Oberg v. Honda Motor Co.*, 851 P.2d 1084 (Or. 1993). The appellate court then affirmed the punitive damages judgment in the *Snap-on* case in one sentence citing *Honda*. *Eulrich v. Snap-on Tools Corp.*, 853 P.2d 1350, 1362 (Or. App. 1993), *petition for cert. filed*, 62 U.S.L.W. 3350 (U.S. Nov. 3, 1993) (No. 93-697).

Thereafter, *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), was issued. The Snap-on *amici* petitioned for rehearing, citing *TXO* for the proposition that post-trial review on the issue of excessiveness

was a required element of due process. The appellate court denied the petition and the Oregon Supreme Court denied further review.

The Snap-on *amici* have a direct interest in the outcome of the case before the Court. They, like Honda, are recent victims of Oregon's prohibition against post-trial review.

SUMMARY OF ARGUMENT

In *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), all nine justices recognized that due process requires courts to conduct post-trial review to determine whether a jury's punitive damages award is excessive. Oregon is the only state that prohibits any such review. After *TXO*, the Oregon Supreme Court twice refused to reconsider the prohibition against post-trial review – in *Honda* and the *Snap-on* case. As demonstrated by the *Snap-on* case, the intent of the Oregon courts is to continue Oregon's current system in *all* cases, not just products liability cases, unless the Court rules the Oregon system is unconstitutional. The Court should rule that Oregon's denial of post-trial review violates due process of law.

ARGUMENT

OREGON'S PROHIBITION OF POST-TRIAL REVIEW OF PUNITIVE DAMAGES SHOULD BE HELD UNCONSTITUTIONAL

Oregon gives juries the discretion to set any amount of punitive damages but bars its courts from determining whether the award is excessive. *See, e.g., Van Lom v. Schneiderman*, 210 P.2d 461 (Or. 1949). In *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), the four-justice plurality and two justices in dissent found that the Due Process Clause sets substantive limits beyond which punitive damages cannot be awarded. *Id.* at 2718-20, 2724-26, 2731. Since excessiveness can only be determined after a jury verdict, the necessary protection for this substantive due process right is adequate post-trial review. All of the justices in *TXO* recognized that procedural due process requires judicial review of punitive damages awards for reasonableness, either expressly, *id.* at 2727, 2740-42, or by reviewing the post-trial review procedures in that case to determine their adequacy, *id.* at 2723-24.

After *TXO*, the Oregon Supreme Court twice declined to reconsider the prohibition against post-trial review – in *Honda* and the *Snap-on* case. As that court views it, due process is satisfied by having adequate pre-verdict procedures. In *Honda*, the Oregon court appears to partly justify its position because of particular jury instructions given in products liability cases. Oberg emphasized that in his response to Honda's petition. That supposed justification is empty rhetoric designed to obfuscate Oregon's true intent. As shown by the *Snap-on* case, in which minimal jury instructions were given, the

Oregon courts intend to continue to follow the bar against post-trial review in all cases. When, as in Oregon, a jury is given the discretion to set any amount of punitive damages it desires, a jury may act out of passion or prejudice and award an excessive amount. The fairness of pre-verdict procedures does not eliminate the risk that a jury will return an excessive verdict. The necessary check to the jury's discretion is post-trial judicial review for excessiveness, which is provided in every other state and was actually the Oregon common law system until abolished by an amendment to the state constitution. *See Van Lom*, 210 P.2d at 465.

The Snap-on *amici* had a compelling case to present to show the punitive damages award was excessive. For example, the amount was 845 times the out-of-pocket loss, two different awards were given for essentially the same conduct, no personal injury was involved, and the jury obviously ignored the instruction to consider a defendant's "income and assets" by ruling that two individual wage-earners, Park and Kash, were personally liable for $4.75 million in punitive damages. The Snap-on *amici* were denied any right to be heard post-trial on the issue. Every defendant in Oregon who now faces or will face a huge punitive damages award will continue to be denied post-trial review unless the Court declares that the Oregon system is unconstitutional.

CONCLUSION

The Court should reverse the punitive damages judgment against Honda and hold that Oregon's refusal to conduct post-trial review to determine whether a jury's award of punitive damages is excessive violates due process of law.

Respectfully submitted,

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IN THE
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Petitioners,

v.

KARL L. OBERG,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-644

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD.; and AMERICAN HONDA MOTOR CO., INC.,
Petitioners,

v.

KARL L. OBERG,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief *amicus curiae*. The written consent of all parties has been filed with the Clerk of this Court. The brief urges reversal of the decision below and thus supports the position of the petitioners.

INTEREST OF THE AMICUS CURIAE

EEAC is a nationwide association of employers and trade associations organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community. The Council's govern-

ing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives the Council an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The issue presented in this case is extremely important to the nationwide constituency which EEAC represents. The courts below concluded that Oregon's state constitution did not violate due process by prohibiting judicial review of jury awards of compensatory and punitive damages verdicts for excessiveness. Employers in Oregon and elsewhere are extremely concerned that individual juries with no experience in employment cases could have a field day awarding large punitive damage awards without appropriate standards to guide them and without any meaningful post-trial review to evaluate the appropriateness of the jury's award.

As employers, all of EEAC's members, and the constituents of its trade association members, are subject to claims for compensatory and punitive damages under a variety of federal and state laws and common law causes of action, including 42 U.S.C. § 1981, many state fair employment practices laws, and most state law tort actions arising out of the employment relationship. In many jurisdictions there are no caps on damages, although appellate review of jury awards for excessiveness is available. EEAC's members also are potential targets for jury trials for compensatory and punitive damages under the Civil Rights Act of 1991 (P.L. 102-166 (1991)), which added these damages to Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act. Although the '91 Act capped these damages for large employers at $300,000 for each claimant, legislation has been introduced in Congress to lift the cap altogether.

Because of its concern that this Court establish meaningful standards for punitive damages and require post-trial review for excessiveness of a jury's punitive damages award, EEAC filed an *amicus curiae* brief in *TXO Prod. Co. v. Alliance Resources Co.*, 113 S. Ct. 2711 (1993), and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Since its founding in 1976, EEAC, acting on its interest in issues involving damage awards under the nation's labor and employment laws, has participated as *amicus curiae* in over 330 cases.[1]

EEAC seeks to assist the Court in this case by highlighting the impact its decision here may have on the field of employment litigation. Accordingly, this brief brings relevant matters to the attention of this Court that have not already been brought to its attention by the parties. Because of its significant experience, EEAC is uniquely situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Respondent Karl Oberg was injured when his Honda three-wheeled all-terrain vehicle overturned while he was attempting to climb a steep embankment. Oberg sued Honda in a jury trial and the jury returned a verdict of

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[1] *See e.g., Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (appropriateness of remedies); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (scope of § 1981); *Murphy v. Am. Motor Sales Corp.*, 570 F.2d 1226 (5th Cir. 1978) (punitive damages under ADEA); *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982) (tolling of back pay liability under Title VII); *Rawson v. Sears, Roebuck & Co.*, 822 F.2d 908 (10th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988) (size of jury award in state law claim); *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466 (11th Cir. 1991) (supporting employer's discharge of supervisor accused of sexual harassment); *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436 (3d Cir. 1992) (arguing for vacation of arbitrator's award which violated the public policy condemning sexual harassment).

$919,390.39 in compensatory damages and $5 million in punitive damages. The jury found Oberg 20 percent at fault, and the trial court reduced Oberg's compensatory award to $735,512.31.

Honda then filed motions for a new trial and for judgment notwithstanding the verdict contending, among other things, that the $5 million punitive judgment award was grossly excessive. The trial court denied Honda's motions without comment. The Oregon Court of Appeals affirmed the judgment of the trial court and Oregon's Supreme Court upheld the appeals court decision.

In Oregon, trial courts and appellate courts are limited in the type of post-trial review they may undertake for jury awards. In the case of punitive damages, for example, Oregon's trial and appellate courts only may review the sufficiency of the evidence and the appropriateness of the jury instructions. Oregon's statute governing evidentiary standards for punitive damages requires that "[e]xcept as otherwise specifically provided by law, a claim for punitive damages shall be established by clear and convincing evidence." Or. Rev. Stat. § 41.315 (1993).

Thus, when a jury returns a punitive damages award, the trial and appellate courts may review the punitive damages award to determine whether "clear and convincing evidence" that the defendant showed "wanton disregard for the health, safety and welfare of others" was present. Or. Rev. Stat. § 30.925 (1993). If a punitive damages award is not supported by clear and convincing evidence, the reviewing court may set aside the judgement.

If, however, a post-trial review does establish that there was clear and convincing evidence to support an award of punitive damages, the reviewing court may not review the award to determine if the punitive damages were excessive. Oregon's constitution prohibits such an inquiry.

Article VII (amended), section 3, of the Oregon Constitution states in relevant part:

> In actions at law, where the value in controvery shall exceed $200, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.

Oregon's Supreme Court interpreted this section to stand for the proposition that:

> [t]hey [the framers of Oregon's constitution] in effect declared their purpose to **eliminate,** as an incident of jury trials in this state, the **common law power** of a **trial court to re-examine the evidence and set aside a verdict because it was excessive** or in any other respect opposed to the weight of the evidence.

Van Lom v. Schneiderman, 187 Or. 89, 99, 210 P.2d 461 (1949) (emphasis added). Thus, in Oregon, trial courts and appellate courts may not review a jury award for excessiveness.

In the current case, the Oregon Court of Appeals and Supreme Court followed *Van Lom v. Schneiderman* and determined that Oregon's constitution did not violate due process. The Oregon Court of Appeals held that due process was not denied because the

> [p]ost-trial review evaluates the *admission* of evidence pertaining to punitive damages and the jury instructions given on that issue. The combined effect of the restrictions on jury discretion mandated by ORS 30.925 [2] and appellate review ensures that

[2] ORS 30.925(3) requires, among other things, that punitive damages be determined and awarded on the basis of the following:

> [t]he likelihood at the time that serious harm would arise from the defendant's misconduct; the degree of the defendant's awareness of that likelihood; the profitability of the defendant's misconduct; the duration of the misconduct and any

> the fact finder be guided by more than a defendant's financial condition and that there be a rational relationship between the amount of the award and what is necessary for deterrence. Pet. 87a (emphasis added).[3]

The Oregon Supreme Court upheld the appeals court decision. The Supreme Court stated,

> [w]e do not interpret *Haslip* [*Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991)] to hold that an award of punitive damages, to comport with the requirements of the Due Process Clause, always must be subject to a form of post-verdict or appellate review that includes the possibility of remittitur." Pet. 25a.

SUMMARY OF ARGUMENT

As many Justices of this Court have observed, unrestrained jury discretion to award punitive damages presents a significant issue under the Due Process Clause. Lacking any guidance as to the appropriate monetary range within which to set an award, juries are left to wander blindly amid concepts of punishment and deterrence, groping in the dark for a suitable amount. Such standardless discretion offers a defendant no warning of its potential liability, and no Constitutional safeguards, even though punitive damages are "quasi-criminal" in nature. Further, the absence of any kind of post-trial review to determine whether punitive damage award was excessive further erodes the defendant's due process rights.

The court below failed to apply the standards developed by this Court in *Pacific Mutual*. In *Pacific Mutual*,

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> concealment of it; the attitude and conduct of the defendant upon discovery of the misconduct; the financial condition of the defendant; and the total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct. . . .

Id.

[3] Citations to the Petition for Certiorari are designated as Pet. —.

this Court approved of Alabama's process for awarding punitive damages and stated "[t]he Alabama Supreme Court's post-verdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." *Pacific Mut.*, 499 U.S. at 22. Further, the Court noted that Alabama's post-trial review accomplishes the following: (1) it determines whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct; (2) it examines the harm that actually has occurred from the defendant's conduct; (3) it discerns the degree of reprehensibility of the defendant's conduct; (4) it measures the profitability to the defendant of the conduct; and (5) it looks at the "financial position" of the defendant. *Id.* at 21-22.

Most recently, in *TXO Prod. Co. v. Alliance Resources Co.*, 113 S. Ct. 2711, 2727 (1993), Justice Scalia, in a concurring opinion, reaffirmed the importance of judicial review:

> Procedural due process also requires, I am certain, judicial review of the sufficiency of the evidence to sustain a civil jury verdict, and judicial review of the reasonableness of jury-awarded compensatory damages . . . So too, I think, with punitive damages: *judicial* assessment of their reasonableness is a federal right . . .

Thus, the courts below erroneously held that Oregon's prohibition of post-trial review for excessiveness did not violate due process. It is clear from this Court's holdings in *Pacific Mutual* and *TXO* that appellate review of punitive damages awards for excessiveness is a vital and necessary step for fulfilling due process requirements.

Standardless jury discretion to award punitive damages without adequate post-trial review is of substantial concern to employers. Punitive damages are available in employment-related claims under federal and state laws

such as 42 U.S.C. § 1981, state fair employment practices statutes, and various state tort laws that have been put to use in employment cases. Juries have awarded exorbitant sums as punitive damages in employment-related claims. In addition, pending legislation in Congress would lift the $300,000 cap on compensatory and punitive damages now available under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act. As is shown by the instant case, employers in Oregon cannot rely on judicial authority to modify such awards.

Also, a more meaningful standard must be adopted *and included in jury instructions* in order to place proper limits on punitive damages awards. Juries, for example, should be instructed that punitive damages should be mitigated if the employer has adopted programs to prevent discrimination or established internal procedures to investigate and punish offenders. Further, a plaintiff's failure to utilize alternative avenues of relief also should be considered as mitigating punitive damages. These factors properly should be considered by an appellate court reviewing the propriety of a jury award.

Finally, in order to comport with due process requirements, post-trial and appellate review of the punitive damages awards must be meaningful. Thus, the post-trial review should determine not only whether there was sufficient evidence present to award punitive damages, but also that the jury relied on that evidence and awarded punitive damages with that evidence and the goal of deterrence and retribution in mind.

ARGUMENT

I. UNREVIEWABLE JURY DISCRETION TO AWARD COMPENSATORY AND PUNITIVE DAMAGES AND THE LACK OF JUDICIAL REVIEW OF THOSE AWARDS VIOLATES DUE PROCESS

The issue before the Court in this case is extremely important to private employers facing potential punitive damages awards in employment-related cases. EEAC's members share this Court's "concern about punitive damages that 'run wild.'" *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. at 18.

In the case at bar, the State of Oregon denied the petitioners its due process rights because Oregon's constitution, Article VII (amended), section 3, prohibits trial and appellate courts from setting aside a verdict on the grounds that it is excessive. Recently, Justice Scalia has noted the importance of judicial review for excessiveness when awarding punitive damages:

> Procedural due process also requires, I am certain, judicial review of the sufficiency of the evidence to sustain a civil jury verdict, and judicial review of the reasonableness of jury-awarded compensatory damages . . . So too, I think, with punitive damages: *judicial* assessment of their reasonableness is a federal right . . .

TXO Prod. Corp., 113 S. Ct. at 2727 (Scalia, J., concurring).

A. This and Other Courts Have Expressed Well-Founded Due Process Concerns Over Unrestrained Jury Discretion to Award Unlimited Punitive Damages

In *Pacific Mutual*, the Court summarized at length the reasons why unlimited jury discretion to award punitive damages may violate the Due Process Clause of the U.S. Constitution:

> This Court and individual Justices thereof on a number of occasions in recent years have expressed

> doubts about the constitutionality of certain punitive damages awards.

Pacific Mut., 499 U.S. at 9. This sentiment was echoed recently in *TXO Prod. Co. v. Alliance Resources Co.*, 113 S. Ct. at 2718: "[s]everal of our opinions have stated that the Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.' "

Particularly well-stated was Justice Brennan's complaint in *Browning-Ferris* that:

> Without statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important and potentially devastating decision.

Pacific Mut., 499 U.S. at 10 (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989)). This unpredictability stems in part from the fact that:

> In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.

Pacific Mut., 499 U.S. at 12 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). While one could speculate about the motives of individual jurors, this Court should establish clear standards to carry out its earlier directive that governments "have no substantial interest in securing for plaintiffs . . . gratuitous awards of more damages far in excess of any actual injury." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 349.

This Court also has stressed that:

> [T]he fact finder must be guided by more than the defendant's net worth. . . . [P]laintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket.

Pacific Mut., 499 U.S. at 22. In this Court's follow-up decision to *Pacific Mutual*, the same concept was emphasized:

> We agree with TXO that the emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident.

TXO Prod. Corp., 113 S. Ct. at 2723. As was pointed out in the labor relations context, there also is the danger that "punitive damages may be employed to punish unpopular defendants." *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 50 n.14 (1979). As the Court stated in *Foust*:

> [S]ince juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused . . . they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger. . . .

Id. (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. at 350).

B. As a First Step for Protecting Due Process Rights, Any Punitive Damages Standards That This Court Establishes Must Be Contained in the Actual Instructions Given to the Jury

The concerns expressed by this Court about excessive punitive damages have not made their way into the jury rooms where employment discrimination cases are considered. As shown below, in a growing number of instances, jury awards have gotten out of hand, with juries awarding multiple-millions of dollars to individual plaintiffs in single-incident discrimination cases. In these cases,

the amount of damages grossly exceeds proven compensatory damages.

As an appropriate first step to protecting due process, any punitive damages standards that are developed should be incorporated *as part of the jury instructions* in cases with potential punitive damages. The application of these standards should entail more than a legal duelling match between the trial and appellate courts. As Justice O'Connor has pointed out, appellate review is impossible where "juries are not told which factors are permissible and which are not." *Pacific Mut.*, 499 U.S. at 56 (O'Connor, J., dissenting).

Also, as is discussed below, the next step for protecting due process is to ensure that trial and appellate courts may review an award of punitive damages for excessiveness.

II. UNRESTRICTED COMPENSATORY AND PUNITIVE DAMAGES AWARDS THREATEN THE NATION'S EMPLOYMENT LAWS

A. The Threat of Unlimited Compensatory Damages for Pain and Suffering and Unlimited Punitive Damages Exists in Employment-Related Claims Under Federal and State Law

The issue presented here, whether due process is violated by Oregon's denial of judicial review of compensatory and punitive damages verdicts for excessiveness, is of substantial importance to employers throughout the United States. Employers can be, and have been, held liable for punitive damages for causes of action arising out of the employment relationship on a number of grounds. 42 U.S.C. § 1981 prohibits racial discrimination in all aspects of employment contracts, and punitive damages are available under that statute. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975). Also, some states have adopted "fair employment practices" laws that substantially parallel coverage

of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"). Of these, several provide expressly for punitive damages by statute. *See, e.g.*, New Jersey Law Against Discrimination, N.J. Stat. Ann. § 10:5-1 *et seq.*, as amended November 20, 1992. Others have been interpreted judicially to provide for punitive damages awards. *Grant v. Monsanto Co.*, 51 Fair Empl. Prac. Cas. (BNA) 1593 (S.D. Ohio, 1989) (compensatory and punitive damages available under Ohio Fair Employment Practice Law).[4]

In addition, many states allow employees to pursue common law causes of action in tort arising out of incidents in the workplace. For instance, in addition to Title VII liability, a sexual harassment claim can give rise to tort claims under state law for intentional infliction of emotional distress or even assault and battery, which in turn can lead to an award of punitive damages.[5] Also, the traditional doctrine of employment-at-will has been eroded significantly in recent years through judicially-created exceptions such as "tort claims of wrongful discharge in violation of public policy, contract based claims of wrongful discharge in violation of an employer's policies, and a new tort of abusive or wrongful discharge." I. Shepard, P. Heylman, and R. Duston, *Without Just Cause: An Employer's Practical and Legal Guide on Wrongful Discharge* 17 (1989). Punitive damages often are available under tort theories, and while

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[4] Although Oregon's Fair Employment Practice Act, Or. Rev. Stat. § 659.010 *et seq.* (1993), does not provide for punitive damages for discrimination in employment, it does provide compensatory damages for "emotional distress and/or impaired dignity." Or. Admin. R. 839-03-185(1) (1993).

[5] *See, e.g., Gilardi v. Schroeder*, 672 F. Supp. 1043 (N.D. Ill. 1986), *aff'd*, 833 F.2d 1226 (7th Cir. 1987) ($12,960.50 in back pay under Title VII and $50,000 in compensatory and $50,000 in punitive damages on state tort claims of battery and intentional infliction of emotional distress awarded to sexual harassment plaintiff).

contract claims do not usually support such a recovery, some states allow an award of punitive damages on a theory of "tortious or bad faith breach of contract." *Id.* at 212.

Moreover, the Civil Rights Act of 1991 amended Title VII and the Americans with Disabilities Act to allow juries to award compensatory and punitive damages for intentional discrimination. *See* 42 U.S.C. § 1981a. For punitive damages to be recovered, the respondent must have engaged in discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). But these amendments provide absolutely no guidance on how to measure the amount of punitive damages.[6]

Presently, the total of compensatory and punitive damages awardable under the ADA and Title VII to an individual plaintiff is capped at $300,000 for employers, such as EEAC's members, with more than 500 employees. 42 U.S.C. § 1981a(b)(3)(D). However, legislation has been introduced in the 103rd Congress that would remove the cap, thus allowing for unlimited damages. *See* H.R. 224, 103d Cong., 1st Sess. (1993) (*Rep. Kennelly Renews Push to Uncap Damages Under 1991 Civil Rights Law*, Daily Lab. Rep. (BNA), Jan. 6, 1993, at A-1), and S. 17, 103d Cong., 1st Sess. (1993) (Senate companion bill to H.R. 224 introduced by Senator Kennedy).

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[6] Likewise, the federal circuits have adopted for Section 1981 cases the standard or "reckless or callous disregard for plaintiff's rights, as well as intentional violations of federal law" set by this Court in *Smith v. Wade*, 461 U.S. 30, 51 (1983); *Stephens v. South Atl. Canners, Inc.*, 848 F.2d 484, 489 (4th Cir.), *cert. denied*, 488 U.S. 996 (1988); *Beauford v. Sisters of Mercy-Province of Detroit, Inc.*, 816 F.2d 1104, 1108-09 (6th Cir.), *cert. denied*, 484 U.S. 913 (1987). Like the Civil Rights Act of 1991, however, Section 1981 and these cases afford no guidance to a jury on assessing the size of an award.

Employers thus are exposed on several fronts to the possibility of unrestricted punitive damages awards. As is evident, recent jury punitive damages awards have been so outrageously out of proportion to the proven compensatory damages that it is likely that no principled standard has been applied. In Oregon this situation is critical because trial and appellate courts are prohibited by Oregon's constitution from reviewing the compensatory and punitive damages awards for excessiveness, thus eliminating any check on run away punitive damages awards.

B. Punitive Damages Awards in the Employment Context Are "Skyrocketing"

Punitive damage awards, particularly in the business context, are increasing by leaps and bounds. A 1987 RAND study, *Punitive Damages: Empirical Findings*, reported massive increases in the number and size of punitive damage awards in business/contract cases, including employment claims, between 1960 and 1984.[7]

Prior to this Court's *Pacific Mutual* decision, awards in the employment field were staggering. A jury in Texas awarded $31,000,000 (reduced to approximately $21,000,000) to an accountant who claimed that his former employer wrongfully fired him after he refused to sign what he believed were fraudulent tax returns. *Sims v. Kaneb Servs., Inc.*, No. 8602474 (Harris County Texas Dist. Ct.) (settled during pendency of motion for new trial.) A former Lockheed auditor was awarded $15,000,000 by a Los Angeles County jury after he alleged he was wrongfully terminated after complaining that the metal used to construct transport planes was defective. *Beneck, Schielke, Jones, Jr. v. Lockheed Corp.*, Case No. C 621967 (Cal. Super. Ct. November 1990).

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[7] M. Peterson, S. Sarma, M. Shanley, *Punitive Damages: Empirical Findings* at vi (1987). *See also Pacific Mut.*, 499 U.S. at 61 (O'Connor, J., dissenting).

If anything, the problem has gotten worse since the *Pacific Mutual* decision was handed down. For example, in Texas, a state court jury awarded $124 million to a Triton employee who claimed that he was wrongfully terminated.[8] Texaco appealed a state court jury award of $20.3 million to a former executive in a sex discrimination case in California.[9] A Dallas jury in April 1993 awarded $15.5 million in actual and punitive damages to an employee erroneously accused of stealing company property.[10] The Texas Supreme Court let stand an award of $13.5 million in actual and exemplary damages to a whistleblower who alleged that the state agency he worked for fired him for reporting wrongdoing.[11] Also in Texas, a state court awarded a 45-year-old roustabout $10,000,000 in damages for injuries he suffered on the job last March.[12] A tree trimmer in South Carolina was awarded $3 million in compensatory and punitive damages when he suffered a laceration to the neck while on the job.[13] Likewise, an Oregon jury awarded $6.2 million to a former executive alleging wrongful termination;[14] $3.9 million was awarded to a former employee of Hughes Aircraft Co. who alleged that he was fired because he

[8] *Janacek v. Triton Energy Corp.*, No. 90-07220-M (Texas Dist. Ct. May 22, 1992).

[9] *Martin v. Texaco Ref. and Mktg. Inc.*, No. C614044 (Cal. Super. Ct. July 17, 1992).

[10] *Hagler v. Procter & Gamble Mfg. Co.*, Case No. 91-5250-E (Texas Dist. Ct. April 23, 1993).

[11] *Texas Dep't of Human Services v. Green*, Case No. D-3986 (Texas S. Ct. February 2, 1994).

[12] *Cockerham v. Diamond M. Co., Diamond M. Hunter Co., Diamond M. Deep Seas Ltd., Kaneb Services, Ltd., and Callais Marine Service, Inc.*, Case No. 65,405 (Texas Dist. Ct. March 1993).

[13] *Land v. Utility Supply and Equipment Co.*, Case No. 91-CP-26-0790 (South Carolina Common Pleas Ct. September 1992).

[14] *Banaitas v. Mitsubishi Bank Ltd.*, No. 89-12-07357 (Or. Cir. Ct. March 19, 1991).

was black;[15] a Michigan jury awarded $1 million to a former salesman for General Electric Co. who claimed that his discharge during a reduction-in-force violated oral assurances of job security that he had received during his interview;[16] and a California jury awarded almost a million dollars to a former employee who alleged breach of contract and intentional infliction of emotional distress due to a negative reference given to a potential employer.[17]

Furthermore, studies indicate that plaintiffs who risk seeing litigation through to the end of a jury trial will find that juries are more likely to announce a plaintiff's verdict than a verdict in favor of employers. For example, the Institute for Civil Justice, part of RAND Corporation's domestic research division, found that plaintiffs were victorious 70 percent of the time in employment cases ending in a jury trial.[18] Orrick, Herrington & Sutcliffe found almost the same result—in a study of all state and federal California courts, juries found in favor of the plaintiff in 61.48 percent of the cases.[19] These studies demonstrate that jury trials are more receptive to plaintiffs than to employers.

The likelihood that they will win before a jury and the possibility of receiving an exorbitant monetary award strongly encourages plaintiffs and plaintiffs' attorneys to

[15] *Harris v. Hughes Aircraft Co.*, No. 010988 (Cal. Super. Ct. June 4, 1991).

[16] *Pietsch v. General Elec. Co.*, No. 89-906227-CZ (Mich. Cir. Ct. April 2, 1991).

[17] *Holton v. Lockheed Corp.*, No. 642082 (Cal. Super. Ct. January 28, 1991).

[18] Detouzos, James N. and Lynn A. Karoly, *Labor Market Responses to Employer Liability*, Institute for Civil Justice, April 5, 1992. The researchers concentrated their study on California juries.

[19] Orrick, Herrington & Sutcliffe, *Employment Law Verdicts*, Labor and Employment Department, June 24, 1992.

proceed to litigation. With such an enormous pay day looming at the end of litigation, plaintiffs and their attorneys may find little reason to explore alternative avenues of resolution, particularly if there is no appellate review of such awards. Fewer and fewer employment cases may settle before trial, thus adding to the burgeoning caseload of federal dockets.

Moreover, in many instances, awards like those cited above clearly will bear "no . . . relation to the actual harm caused," *Gertz*, 418 U.S. at 350, and are "be[ing] employed to punish unpopular defendants." *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 50 n.14 (1979). In each of these cases, the only rational explanation for the massive award is that the jury sought to punish a large employer by granting the plaintiff a windfall far in excess of actual damages.

Federal courts generally have discretion to set aside an excessive jury verdict and order a new trial, or order remittitur of a portion of the verdict that it finds to be excessive. *See generally* 6A Moore's Federal Practice § 59.08[6] (2d Ed. 1989).[20] Similar procedures are available in most states. *See, e.g.*, Ill. Rev. Stat. Ch. 110, Para. 2-1207 (1988) (granting trial court statutory authority to order remittitur and conditional new trial

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[20] *See also Vance v. Southern Bell Tel. and Tel. Co.*, 863 F.2d 1503 (11th Cir. 1989) (upholding lower court's grant of judgment notwithstanding the verdict and in the alternative for a new trial on grounds, *inter alia*, that a jury award of $2,500,000 in claims under 42 U.S.C. § 1981 was excessive) on remand, 672 F. Supp. 1408 (M.D.Fla. 1987), reversed 983 F.2d 1573 (11th Cir. 1993) (reversing second jury verdict on other grounds); *Ramsey v. American Air Filter Co., Inc.*, 772 F.2d 1303, 1314 (7th Cir. 1985) (granting new trial on issue of punitive damages in employment discrimination action under 42 U.S.C. § 1981 unless plaintiff agrees to remittitur from $150,000 to $20,000); *Rogers v. Fisher Body Div., G.M.C.*, 739 F.2d 1102, 1109 (6th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985) (reversing and remanding $500,000 punitive damages award under 42 U.S.C. § 1981 for new trial).

in case of excessive jury award of punitive damages). Oregon's courts, however, are prohibited from setting aside an excessive jury verdict or ordering remittitur of a verdict, thus setting the stage for exorbitant jury verdicts without the benefit of meaningful judicial review.

C. The Absence of Reasonable Restrictions on Punitive Damages Awards Frustrates the Remedial and Conciliatory Policies Inherent in Federal Labor and Employment Law

Unrestricted punitive damages awards are particularly inappropriate because of the unique nature of employment disputes. Unlike typical tort and contract claims, employment controversies do not take place between strangers. The plaintiff and defendant in an automobile accident case generally never met before they collided. The parties to an ordinary breach of contract claim have no ties other than the contract itself. In contrast, most labor and employment disputes involve individuals and companies with ongoing relationships that began before the dissension and are expected to continue after the parties' differences are resolved. *Cf. Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. at 51-52 (". . . the threat of punitive damages could disrupt the responsible decision making essential to peaceful labor relations.").

Even though punitive damages were added by the Civil Rights Act of 1991, Title VII retains the provisions that require and encourage conciliation and resolution rather than litigation.

> Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., to assure equality of employment opportunities by eliminating those practices and devices that discrimination on the basis of race, color, religion, sex, or national origin. . . . *Cooperation and voluntary compliance were selected as the preferred means for achieving this goal.* To this end, Congress created the Equal Employment

> Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation and persuasion before the aggrieved party was permitted to file a lawsuit.

Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (emphasis added).

The availability of unrestricted punitive damages would seriously hamper these conciliation efforts. Federal judges, who are ideally situated to observe the effects of different remedial schemes on the volume of litigation and the willingness of the parties before them to settle, have found general damages awards to be a serious impediment to conciliation and settlement in employment litigation.[21]

[21] The potential effect on the conciliation process of the availability of an unquantified damages remedy was best expressed by courts that wrestled in the late 1970's and early 1980's with the issue of whether compensatory damages could be recovered under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, which authorizes the award of both "legal" and "equitable" relief. These courts agreed that the hope of such awards would "severely cripple the mediation process." *Dean v. American Sec. Ins. Co.*, 559 F.2d 1036 n.8 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978). *See Rogers v Exxon Research & Eng'g Co.*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978) ("Haggling over an appropriate sum could become a three-sided conflict among the employer, the [EEOC], and the claimant."); *Dean, supra* at 1039 ("The silence of the Act with respect to general damages is entirely consistent with legislative intent to abstain from introducing a volatile ingredient into the tripartite negotiations involving [EEOC], employee and employer which might well be calculated to frustrate rather than to 'effectuate the purposes' of the Act."); *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 147 (2d Cir. 1984) ("If an individual alleging discrimination knew he could recover compensatory damages if he refused to settle during the administrative process and commenced a civil suit, he would have little incentive to resolve the dispute during the conciliation process."); *Sant v. Mack Trucks, Inc.*, 424 F. Supp. 621 (N.D. Cal. 1976) ("If large tort recoveries are allowable under the ADEA, it is doubtful that alleged age discriminatees will enter into good faith conference and conciliation when around the corner lies the possibility of large dollar pain and suffering recoveries.").

As these judges have observed, the hope of a "big ticket" damages award at trial is a major disincentive to resolution of cases without litigation.

Even though unlimited punitive damages are not now available under Title VII and the Americans with Disabilities Act, the Age Discrimination in Employment Act[22] (ADEA) and other federal labor employment statutes, plaintiffs frequently add pendent state claims to discrimination complaints under federal law. *Cf. United Mine Workers of Am. v. Gibbs*, 383 U.S. 720 (1966) (doctrine of pendent jurisdiction). These state law claims often afford a punitive damages remedy where federal law does not. The possibility of an unrestricted punitive damages award under state law thus has the same deleterious effect on conciliation efforts as would the availability of such an award under the federal statute itself.

[22] The ADEA does provide for "liquidated damages" in cases of "willful" violations, but these damages are strictly limited to an amount equal to the "unpaid compensation." 29 U.S.C. § 626(b). Moreover, a "willful" violation occurs only when an employer acts with "knowing or reckless disregard for whether or not the challenged conduct violated the Act." *Trans World Airlines v. Thurston, Inc.*, 469 U.S. 111, 128 (1985).

III. MEANINGFUL JUDICIAL REVIEW OF COMPENSATORY AND PUNITIVE DAMAGES AWARDS IS NECESSARY TO FULFILL DUE PROCESS REQUIREMENTS

A. In Order to Comply With Due Process When Awarding Compensatory and Punitive Damages, Both the Trial Court and the Appellate Courts Must Have the Authority to Review Jury Awards to Ensure that the Awards Are Based on the Evidence Presented at Trial and Are Free of Bias, Passion, or Prejudice

The courts below concluded that Oregon's constitution prohibits trial and appellate courts from reviewing compensatory and punitive jury verdicts for excessiveness. Further, Oregon's constitution does not allow a reviewing court to discern whether the jury's award is based on the evidence presented at trial or is motivated by bias, passion, or prejudice. Thus, a reviewing court in Oregon is not permitted to determine: (1) whether the award is excessive; (2) whether the jury actually relied and adhered to the evidence presented at trial and made an appropriate award based on that evidence or (3) whether the jury made an appropriate decision to award punitive damages based on the evidence and the trial court's instructions, but awarded the plaintiff an excessive amount because it relied on impermissible considerations such as the race, ethnic origin, or religion of the parties when determining the amount of the award.[23]

This Court and others have indicated that meaningful appellate review is necessary to ensure that due process requirements are fulfilled. In *Pacific Mutual*, for example, this Court approved of Alabama's punitive damages proc-

[23] For example, the jury could assess a large punitive damages award against a defendant corporation because the corporation was closely identified with a particular religious group that the jurors were openly hostile to, even though that was never an issue at trial.

ess because Alabama provided a three step process for reviewing a punitive damages award.[24] This Court concluded that the process satisfied due process requirements because (1) the jury was adequately instructed that its discretion to award punitive damages was confined to satisfying the goals of deterrence and retribution; (2) the post-trial procedures for scrutinizing punitive awards ensured "meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages";[25] and (3) the review of punitive damages awards by the Alabama Supreme Court provided an additional check on the jury's discretion. *Pacific Mut.*, 499 U.S. at 19-21. This Court concluded, "[t]he application of these standards . . . imposes a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages." *Id.* at 22.

Recently, the Third Circuit, relying on the *Pacific Mutual* factors, also determined that a post-trial review of a jury verdict is a crucial feature when discerning whether due process requirements have been satisfied.

> [T]he *scope* of both trial court and appellate review were significant features in the Court's approval of the *Haslip* jury's punitive damage award, and thus we consider those applicable here.

[24] The Alabama process includes instructing the jury; performing a post-trial review to ensure that the jury's award was appropriate; and reviewing the trial court's approval or remittitur of the punitive damages award.

[25] In *Hammond v. Gadsden*, 493 So. 2d 1374 (1986), the Alabama Supreme Court developed standards for the appellate courts to use when reviewing for jury bias, passion, or prejudice:

> Among the factors deemed 'appropriate for the trial court's consideration' are the 'culpability of the defendant's conduct,' the 'desirability of discouraging others from similar conduct,' the 'impact upon the parties,' and 'other factors, such as the impact on innocent third parties.'

Pacific Mut., 111 S. Ct. at 1044 (quoting *Hammond v. Gadsden*, 493 So. 2d 1374, 1379 (1986)).

Dunn v. Hovic, 1 F.3d 1371, 1381 (3rd Cir. 1993) (emphasis added). Based on these factors, the Third Circuit approved of the district court's decision to remit a portion of the punitive damage award. The Third Circuit noted that the district court had considered the defendant's net worth, the relationship between the compensatory award and its remitted punitive damages award, and the size of similar awards in other cases when deciding to reduce the initial jury verdict award. The Third Circuit stated, "[t]hese factors considered in post-trial review were approvingly referred to in *Haslip*, and serve as an effective counterpoint to the wide discretion given the jury." *Dunn*, 1 F.3d at 1382.

Thus, the Third Circuit in *Dunn* recognized that juries may be inclined to award punitive damages that are excessive and that a post-trial review of the proper "scope" provides an opportunity to correct the jury's errors and ensure that due process requirements are fulfilled. Post-trial review in Oregon does not permit such an inquiry, much less an inquiry of a constitutionally adequate "scope."

Similarly, the Ninth Circuit also relied on *Pacific Mutual's* three step process for ensuring due process in the award of punitive damages. In *Morgan v. Woessner*, 997 F.2d 1244, 1257-58 (9th Cir. 1993), the court emphasized the following: (1) the importance of properly instructing the jury; (2) the necessity for the trial court to review the punitive damages award and record its reasons for upholding or altering the award; and (3) the importance of appellate review to ensure that the trial court properly instructed the jury, recorded its reasons for upholding or altering the award, and awarded the amount necessary to accomplish the goals of punishment and deterrence.

Thus, the Ninth Circuit did not merely examine the jury award to determine whether there was sufficient evidence to allow a punitive damages award, the court held that

due process requires the court to examine the jury's award to ensure that it was based on the appropriate evidence and accomplished the goals of punishment and deterrence.

B. Employer Efforts to Prevent Discrimination Should Bar or Mitigate Punitive Damages, and Juries and Reviewing Courts Should Be Required to Recognize Such Factors

1. *The Jury and Reviewing Courts Should Consider Favorably Employer Programs Designed to Prevent Discrimination*

This Court previously has held, in the sexual harassment context, that employers cannot always be held strictly liable for the actions of supervisors. *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986). This rule is equally, if not more, relevant to liability for punitive damages. As Chief Justice Rehnquist has observed, punitive damages often are rationalized as punishment, as deterrence, and as a "bounty" to encourage litigation. *Smith v. Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting). Where an employer, however, has made substantial efforts to prevent the harm complained of, none of these purposes is served by a punitive damages award against that employer. Thus, standards are necessary to establish when, if ever, an employer may be liable for punitive damages based upon the doctrine of *respondent superior*.[26]

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[26] An example of such mitigating factors can be found in the 1991 amendments to the New York City Human Rights Law, Chapter 5, 38-107, 13(d)(1). As mitigating factors for the amount of civil penalties, the Commission can consider whether the employer:

> (1) Established and complied with policies, programs and procedures for the prevention and detection of unlawful discriminatory practices by employees, agents and persons employed as independent contractors, including but not limited to:
>
> > (i) A meaningful and responsive procedure for investigating complaints of discriminatory practices by employees,

The sexual harassment context provides a particularly appropriate model for examination. Sexual harassment in the workplace can occur in two circumstances: "quid pro quo," where the offender is in a position of authority and ties acceptance of sexual advances to advancement or other economic benefits, and "hostile environment," where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (quoting EEOC guidelines on sexual harassment, 29 C.F.R. § 1604.11(a)(3)). *See also Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 370-71 (1993).

In *Vinson* the Court suggested mitigation factors such as (1) the existence of a specific policy prohibiting sexual harassment; (2) whether the policy is communicated to employees in a manner that encourages them to report harassing behavior; (3) whether and when the employer learned of the misconduct; and (4) if the employer's response was adequate. *Vinson*, 477 U.S. at 72-75. Accordingly, federal courts since *Vinson* have based their decisions on these factors.[27] Thus, if an employer can

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agents and persons employed as independent contractors, and for taking appropriate action against those persons who are found to have engaged in such practices;

(ii) A firm policy against such practices which is effectively communicated to employees, agents and persons employed as independent contractors;

(iii) A program to education employees and agents about unlawful discriminatory practices under local, state and federal law; and

(iv) Procedures for the supervision of employees and agents and for the oversight of persons employed as independent contractors specifically directed at the prevention and detection of such practices . . . .

[27] *See, e.g., Saxton v. AT&T*, 63 Fair Empl. Prac. Cas. (BNA) 625 (7th Cir. 1993) (employer not liable for "hostile environment" of sexual harassment under Title VII when it took prompt and appropriate remedial action and further, Title VII only requires

demonstrate that it made a substantial effort to prevent the existence of a "hostile environment" it may be insulated from liability.

It does not follow, however, that a jury also should be able to award unreversible punitive damages under all circumstances. Punitive damages are intended to punish wrongdoers and deter future unlawful conduct. If an employer has devoted substantial effort to implementing an anti-harassment policy but was unable to prevent the disobedience of an errant employee, it would serve no purpose to punish the employer. Thus, in cases where punitive damages are available, the employer's efforts should be considered as negating, or at least mitigating against, such an award. At the very least, the charge to the jury should direct the jury to take the employer's efforts into account. Such efforts, moreover, should be taken into consideration during meaningful judicial review.

For example, evidence that the employer has established a strong policy forbidding sexual harassment, has communicated that policy to supervisors and rank-and-file alike, and has indicated its intent to punish those who disobey, should be relevant to show that the company does not condone harassment. Thus, such evidence should

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that the employer take steps reasonably likely to stop the harassment); *Nash v. Electrospace System*, 9 F.3d 401 (5th Cir. 1993) (the company's prompt remedial action provided a defense to Title VII liability); *Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987) (employer not liable for "hostile environment" sexual harassment under Title VII when it took immediate action, including investigation and discipline, upon receipt of complaint); *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424 (8th Cir. 1984) (same); *Kauffman v. Allied Signal*, 970 F.2d 178 (6th Cir.), *cert. denied*, 113 S. Ct. 831 (1992) (same); *Scherer v. Rockwell Int'l Corp.*, 975 F.2d 356 (7th Cir. 1992). *But compare Karibian v. Columbia University*, 63 Fair Empl. Prac. Cas. (BNA) 1038 (2d Cir. 1994) (employer is strictly liable for the *quid pro quo* harassment of a supervisor and for the harassing environment created by the supervisor.)

distinguish and separate the company's liability from that of an individual supervisor or employee who in effect has engaged in unauthorized, willful misconduct. Indeed, imposing punitive damages against the employer in this situation would be nothing more than improperly dipping into an innocent "deep pocket." Only judicial review can ensure that inappropriate punishment does not occur.

2. *A Victim's Failure to Use the Employer's Internal Grievance Procedure Should Mitigate Against Punitive Damages*

Likewise relevant is evidence that the company's policy encouraged employees to report incidents of discrimination or harassment, including methods to bypass the direct supervisor if that person is also the harasser. An employee's failure to come forward to take advantage of the anti-harassment policy must then negate or mitigate against a punitive damages award. The plaintiff's refusal to make use of an available recourse that could have effectively remedied the situation must be taken into consideration in mitigation of a punitive damages award.

In addition, where the affected employee does not make use of an anti-harassment policy and the employer has no reason to know that harassing behavior is occurring, the employer's lack of knowledge also must be considered a mitigating factor. In this situation, punitive damages are particularly inappropriate. Without actual knowledge or any reason to know that unlawful conduct is occurring, the employer is unable to take steps to protect itself from actions contrary to company policy, even if it has a comprehensive anti-harassment policy. Punitive damages would serve no purpose, since there is no employer conduct to be deplored and deterred.

3. *An Employer's Attempt to Investigate and Remedy Misconduct Should Mitigate Punitive Damages*

Finally, the conduct of an employer who *is* informed of harassing behavior is extremely relevant to mitigation of any punitive damages award. An employer who can show that, upon learning that harassment has occurred, it conducted a thorough and bona fide investigation, reached a rational conclusion and took appropriate action, should be credited for those efforts. Indeed, the EEOC has strongly supported such actions. The agency's Guidelines take the position that employers who take "immediate and appropriate" corrective action are not liable for the acts of co-employees. 29 C.F.R. § 1604.11(d).

It also could be argued that an employer who conducts a complete investigation and reaches a well-supported, reasonable judgment that sexual harassment has not occurred, and thus takes no action against the accused employee, should receive credit for its good faith efforts even if a trier of fact later disagrees with its conclusion.

"Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981). Thus, as the purpose of punitive damages is to punish a wrongdoer and deter future unlawful conduct, it stands to reason that such awards should be severely limited, if not forbidden, when an employer made a good faith effort to prevent the unlawful conduct but its effort was unavailing. Accordingly, this Court should reject any *per se* rule that would allow a jury unrestricted discretion to award punitive damages solely on the basis of *respondent superior*. Instead, if the Court finds that such awards are appropriate under any circumstances, it should adopt reasonable standards, including taking into account employer efforts to prevent unlawful behavior by

subordinates as mitigating factors.[28] EEAC's members are extremely concerned that these relevant factors would not be given sufficient consideration if jury awards were not reviewable by the trial or appellate courts.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the decision of the Supreme Court of Oregon be reversed.

Respectfully submitted,

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February 28, 1994

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[28] Another favorable approach to controlling punitive damages was suggested by Justice O'Connor in *Pacific Mut.*, 111 S. Ct. at 1064. The trial could be *bifurcated* into liability and punitive damages stages. This approach makes it easier to impress upon the jury that a higher degree of evidence is necessary to support punitive damages awards.

No. 93-644

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

HONDA MOTOR CO., LTD; HONDA R&D CO., LTD.;
and AMERICAN HONDA MOTOR CO., INC.,
Petitioners,

v.

KARL L. OBERG,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF *AMICI CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CHEMICAL MANUFACTURERS ASSOCIATION, DEFENSE RESEARCH INSTITUTE, NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AND OREGON ASSOCIATION OF DEFENSE COUNSEL, IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-644

HONDA MOTOR CO., LTD; HONDA R&D CO., LTD.; and AMERICAN HONDA MOTOR CO., INC.,
Petitioners,

v.

KARL L. OBERG,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF *AMICI CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CHEMICAL MANUFACTURERS ASSOCIATION, DEFENSE RESEARCH INSTITUTE, NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AND OREGON ASSOCIATION OF DEFENSE COUNSEL, IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI CURIAE

Amici submit this brief in support of Petitioners to assist the Court in resolving the procedural due process issues presented in this case.* The interest of *Amici* is not in adding to Petitioners' thorough showing that due process requires *some* form of judicial review; rather, *Amici* seek to show what due process standards that review must satisfy, and to urge the Court to enunciate those standards in this case so as to bring a greater level of predictability and fairness to punitive damages proceedings in the various states.

* Consent letters have been filed with the Clerk of this Court.

Amici's interest in this case arises from the fact that, as shown by the brief descriptions of each of them below, their members collectively constitute the very core of commercial activity in the United States, and it is their members and other commercial entities that have suffered directly from the surge of arbitrary, discriminatory, and excessive punitive damages judgments in recent years. *See, e.g.*, M. Peterson, S. Sarma & M. Shanley, *Punitive Damages: Empirical Findings* 53 (1987) (results of empirical study by RAND Institute for Civil Justice "suggest that not only do business defendants have larger punitive awards assessed against them, but they are also likely to pay a greater portion of those awards"). *Amici* therefore have a strong interest in helping the Court to articulate standards of judicial review that are necessary to ensure that punitive damages proceedings comport with due process. As Justice O'Connor stated last term:

> This Court's decision in *Haslip* promised that, even if juries occasionally failed to fulfill their function faithfully, trial and appellate courts would provide meaningful review sufficient to discern impermissible influences and guarantee constitutional results.

TXO Production Corp. v. Alliance Resources Corp., —— U.S. ——, ——, 113 S. Ct. 2711, 2742 (1993) (O'Connor, J., dissenting). *Amici* seek to have that promise of constitutional protection fulfilled.

The Product Liability Advisory Council, Inc., is an association of industrial companies, including Honda North America, Inc., that was formed for the principal purpose of submitting *amicus curiae* briefs in appellate cases involving significant issues affecting the law of product liability.

The Chamber of Commerce of the United States of America is America's largest federation of businesses, representing more than 220,000 companies, several thousand trade and professional associations, and hundreds of state and local Chambers of Commerce.

The Chemical Manufacturers Association is a nonprofit trade association whose member companies produce, market, and use industrial chemicals. Its member companies comprise 90 percent of the production capacity of basic industrial chemicals in the United States.

The Defense Research Institute is the largest national organization of lawyers specializing in the defense of civil litigation. Its total constituency consists of some 19,000 defense trial lawyers through affiliation with the International Association of Defense Counsel, the Federation of Insurance and Corporate Counsel, the Association of Defense Trial Attorneys, and some sixty state and local defense attorney organizations.

The National Association of Manufacturers is an association of approximately 12,500 companies and subsidiaries that together employ 85 percent of all manufacturing workers in the United States and produce more than 80 percent of the nation's manufactured goods.

The Oregon Association of Defense Counsel ("OADC") is a nonprofit association of Oregon attorneys whose practice consists mainly of representing defendants in civil litigation.

PRELIMINARY STATEMENT

The opinion of the Oregon Supreme Court, reported at 316 Or. 263, 851 P.2d 1084, the opinion of the Oregon Court of Appeals, reported at 108 Or. App. 43, 814 P.2d 517, and the record below provide the following facts on which *amici* rely.

This product liability case arises out of injuries incurred by Plaintiff Karl Oberg when the all-terrain vehicle ("ATV") he was attempting to ride up a steep embankment overturned. The ATV had been designed, manufactured, and distributed by Petitioners Honda Motor Co., Ltd., Honda R&D Co., Ltd., and American Honda Motor Co., Inc. (collectively, "Honda").

Oberg sought punitive damages, and the trial court gave the following punitive damages instructions to the jury:

> If you have found that plaintiff is entitled to general damages, you must then consider whether to award punitive damages. Punitive damages may be awarded to the plaintiff in addition to general damages to punish wrongdoers and to discourage wanton misconduct.
>
> In order for plaintiff to recover punitive damages against the defendant[s], the plaintiff must prove by clear and convincing evidence that defendant has shown wanton disregard for the health, safety, and welfare of others.
>
> Clear and convincing evidence is evidence that enables you to find that the truth of the facts asserted is highly probable.
>
> Wanton disregard for the health, safety, and welfare of others is conduct amounting to a particular aggravated deliberate disregard of the rights of others.
>
> If you decide this issue against the defendant[s], you may award punitive damages, although you are not required to do so, because punitive damages are discretionary.
>
> In the exercise of that discretion you shall consider evidence, if any, of the following:
>
> First, the likelihood at the time of the sale that serious harm would arise from defendants' misconduct.
>
> Number two, the degree of the defendants' awareness of that likelihood.
>
> Number three, the duration of misconduct.
>
> Number four, the attitude and conduct of the defendant[s] upon notice of the alleged condition of the vehicle.
>
> Number five, the financial condition of the defendant[s].

> And the amount of punitive damages may not exceed the sum of $5 million.

(Tr. 24:2944.)

The jury awarded compensatory damages of $919,390.39 and punitive damages of $5 million. Because the jury found Oberg 20 percent at fault, the trial court reduced the compensatory award by that percentage and entered a judgment for Oberg in the sum of $5,735,512.31.

Honda moved for judgment notwithstanding the verdict and, in the alternative, for a new trial. The motion asserted, among other points, that the punitive damages award had resulted from procedures that failed to meet due process requirements and was excessive as a matter of law. The trial court denied the motion without stating any reason, either at the hearing or in the written order. (Tr. 13:3063).

Honda appealed, again challenging both the punitive damages procedures and the excessiveness of the punitive damages award. The Oregon Court of Appeals held that the jury instructions "adequately guided the jury during its consideration of defendants' liability for punitive damages." 108 Or. App. at 53, 814 P.2d at 523. The court of appeals also held that Article VII (amended), section 3, of the Oregon Constitution prohibited both it and the trial court from setting aside the verdict as being excessive, and that the same provision limited appellate review to asking only whether there was "any evidence" to support a punitive damages verdict. 108 Or. App. at 55, 814 P.2d at 524. The court of appeals concluded that this combination of jury instructions and appellate review, with no judicial review for excessiveness of the punitive damages award, satisfied the requirements of due process.

Honda appealed to the Oregon Supreme Court, which affirmed. The supreme court concluded that no judicial review for excessiveness, either by the trial court or by

any appellate court, was constitutionally required; rather, it held, the combination of jury instructions and limited appellate review to determine whether there was any evidence to support an award of punitive damages was sufficient to satisfy due process. 316 Or. at 284-85, 851 P.2d at 1096.

SUMMARY OF ARGUMENT

As this Court explicitly recognized in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 15 (1991), one of the fundamental safeguards against arbitrary and excessive punitive damages awards at common law was "review by trial and appellate courts to ensure that [the award] is reasonable." Today, as exemplified in the extreme case of an Oregon law that precludes any judicial review of the reasonableness of a punitive damages award, that fundamental safeguard is in dire need of affirmation as a requirement of due process of law. Because a requirement without content is tantamount to no requirement at all, it is equally important that this Court reaffirm the basic elements of the required review.

At the threshold, judicial review of the reasonableness of a punitive damages award requires the reviewing courts to determine whether the award resulted from passion, prejudice, or consideration of improper factors, such as the defendant's ethnicity, place of citizenship, or other status. Any award based on such factors would be arbitrary or invidiously dicriminatory, not reasonably calculated to promote the legitimate purposes of deterrence and retribution.

But review merely for the absence of reliance on improper factors cannot be equated with review for reasonableness. Accordingly, as indicated in *Haslip*, judicial review for reasonableness also requires the reviewing courts to ascertain whether the punitive damages award being reviewed lies within the range of sums that can reasonably be said to be necessary to achieve the legitimate purposes of deterrence and retribution. This level

of scrutiny is made especially necessary by the skeletal guidance that most jurors receive in instructions that merely mention deterrence and retribution as purposes, yet never define those terms or identify any of their limiting principles.

Moreover the test of reasonableness is an objective test. It therefore must be based on objective evidence in the record which indicates that the award reflects or fails to reflect a reasonably successful effort by the jury to punish within the confines dictated by deterrent and retributive principles. The questions that facilitate such objective review are those that ask whether the evidence and arguments presented to the jury by the plaintiff were of the type that promote legitimate deterrent and retributive principles or, instead, sought consideration of status and other improper factors; whether the jury instructions were merely skeletal or, instead, identified the limiting principles of deterrence and retribution and cautioned the jury against reliance on status and other improper factors; and whether the size of the punitive damages award, combined with the deterrent and retributive force of the compensatory award, is proportionate to the wrong committed when compared to other punishments inflicted for other wrongs in the form of criminal fines, civil penalties, and other punitive damages awards, taking into consideration such factors as the nature of the wrongs, the harm caused, the harm threatened and the probability of its accrual.

Unless this Court both reaffirms that due process requires objective judicial review of the reasonableness of punitive damages awards and outlines for lower courts the types of considerations that must inform that review to ensure that it is objective, lower court opinions will continue to reflect not a consideration of the record evidence that bears on the reasonableness issue, but only conclusions that the courts' subjective consciences were or were not shocked. To the extent that those opinions continue to proliferate, so, too, will defendants continue to be deprived of due process of law.

ARGUMENT

I. DUE PROCESS REQUIRES THAT PUNITIVE DAMAGES VERDICTS BE JUDICIALLY REVIEWED FOR REASONABLENESS

As this Court has recognized for almost a century:

> [C]onsistently with the requirements of due process, no change in ancient procedures can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law, and protect the citizen in his private right, and guard him against the arbitrary action of government.

Twining v. New Jersey, 211 U.S. 78, 101 (1908). Judicial review for the reasonableness of punitive damages awards is just such an "ancient procedure" that guards "against the arbitrary action of government" and that therefore cannot be withheld without violating the requirements of due process.

This Court recently confirmed that judicial review for reasonableness of punitive damages awards has long been a fundamental characteristic of punitive damages proceedings.

> Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. *The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.*

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 15 (1991) (emphasis added). *Accord TXO Prod. Corp. v. Alliance Resources Corp.*, —— U.S. ——, ——, 113 S. Ct. 2711, 2720 (1993) (Stevens, J., Rehnquist, C.J. & Blackmun, J.) ("A general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus."); *id.* at 2727 (Scalia & Thomas, JJ., concurring in the judgment) (" 'procedural due process' requires

judicial review of punitive damages awards for reasonableness"); *cf. id.* at 2731-32 (O'Connor, J., dissenting) (urging objective criteria for judicial review and noting that the Court previously had held an award "wholly disproportionate to the offense and obviously unreasonable" in *St. Louis, I.M. & S.R. Co. v. Williams*, 251 U.S. 63, 66-67 (1919)).

II. JUDICIAL REVIEW FOR REASONABLENESS OF A PUNITIVE DAMAGES AWARD REQUIRES THE REVIEWING COURT TO ASCERTAIN WHETHER THE AWARD WAS BASED ON IMPROPER FACTORS AND WHETHER THE AWARD IS WITHIN A RANGE THAT CAN REASONABLY BE SAID TO FURTHER THE LEGITIMATE PURPOSES OF DETERRENCE AND PUNISHMENT

A. At the Threshold, Judicial Review Must Ascertain Whether the Punitive Damages Award Resulted From Passion, Prejudice, or Consideration of Improper Factors

At a minimum, courts reviewing a punitive damages award must ascertain whether the award resulted from passion, prejudice, or consideration of improper factors, such as the defendant's ethnicity, place of citizenship, or other status. Under any interpretation of the word, no award that fails this threshold scrutiny can be "reasonable" within the meaning of due process. *See TXO*, 113 S. Ct. at 2725 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 2734-42 (O'Connor, White & Souter, JJ., dissenting); *Haslip*, 499 U.S. at 27 (Scalia, J., concurring in the judgment); *id.* at 41 (Kennedy, J., concurring in the judgment); *id.* at 55 (O'Connor, J., dissenting). In particular, if an award were to be based on passion, prejudice, or improper factors, it could not be "rational in light of [the proper] purpose to punish what has occurred and to deter its repetition." *Haslip*, 499 U.S. at 21. Instead, it would be exactly the type of arbitrary or discriminatory punishment against which the due process clause stands as a bulwark. *See, e.g., Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966); *Hoffman*

Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

B. Due Process Requires That Judicial Review for Reasonableness Also Ascertain Whether the Punitive Damages Award Lies Within the Range of Sums That Can Reasonably Be Said to Be Necessary to Achieve the Legitimate Purposes of Deterrence and Punishment

As noted above, under the traditional common-law approach that infuses the general term "due process" with specific content, the jury's award of punitive damages is "reviewed by trial and appellate courts to ensure that it is *reasonable*." *Haslip*, 499 U.S. at 15 (emphasis added). *Accord TXO*, 113 S. Ct. at 2727 (Scalia & Thomas, JJ., concurring in the judgment). Thus, the judicial review required by due process in punitive damages proceedings means more than mere assurance that this form of punishment has not resulted from passion, prejudice, or a consideration of improper factors. *Cf. Haslip*, 499 U.S. at 21 n.10 (Alabama's detailed substantive standards and comparative analysis for evaluating the reasonableness of punitive damages awards "distinguishes Alabama's system from the Vermont and Mississippi schemes about which Justices expressed concern in . . . *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S. Ct. 1645, 100 L. Ed. 2d 62 (1988)," where Mississippi applied only a "passion, bias and prejudice" standard of appellate review.) Specifically, there must be assurance that the jury has exercised its discretion "within reasonable constraints," *Haslip*, 499 U.S. at 20, and in the appellate context this means judicial review that "makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition," *id.* at 21. *See id.* (approving Alabama procedures in part because they included established judicial review criteria "for determining whether a punitive award is reasonably related to the goals of deterrence and retribution"); *id.* at 22 (approving Alabama procedures in part because their appellate review standards "provide for a rational relationship in

determining whether a particular award is greater than reasonably necessary to punish and deter").

Due process requires this careful judicial scrutiny of punitive damages awards for two reasons. First, unlike the case with issues of compensatory damages and liability, juries in many jurisdictions, including the Alabama jury in *Haslip* and the Oregon jury below, are explicitly told that it is within their discretion to decide whether to award punitive damages, and if so, in what amount. *See Haslip*, 499 U.S. at 6 n.1; Tr. 24:2944. Thus, juries are made to feel that they are not as restricted by rules of law in deciding whether, and how severely, to punish as they are in deciding whether, and how substantially, the plaintiff has been harmed. In addition, most juries, including the jury below, are told nothing at all about the limiting principles of deterrence and punisment that must inform their exercise of the discretion they are told they have; they are told nothing at all about punishments that their legislatures have statutorily found appropriate, in the form of criminal fines, civil penalties, or double- and treble-damages provisions, for similar or more heinous wrongdoing; and they either are not told what factors should be considered or, like the jury below, are given a laundry list of "numerous, and sometimes intangible, factors." *TXO*, 113 S. Ct. at 2720 (Stevens, J., Rehnquist, C.J. & Blackmun, J.).

Under these conditions the danger of arbitrary, excessive, or invidiously discriminatory punishment is particularly great. The "skeletal" guidance provided to juries is "scarcely better than no guidance at all," and it creates a need for "longer and harder" judicial review. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring).

In sum, careful judicial review is required because juries, lacking adequate constraints or guidance, are likely to "assess punitive damages in wholly unpredictable amounts," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), award punitive damages "to punish un-

popular defendants," *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 50 n.14 (1979), and base punitive damages on "caprice and prejudice." *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., Burger, C.J. & Powell, J., dissenting). These are the fundamental dangers against which due process is supposed to protect.

C. Judicial Review for Reasonableness Must Be Based on Objective Evidence in the Record

Judicial review to determine whether a punitive damages award resulted from passion, prejudice, or consideration of improper factors, and whether the award can reasonably be said to be necessary to achieve the legitimate purposes of deterrence and punishment, can and must be based on objective evidence in the record. *See Rummel v. Estelle*, 445 U.S. 263, 274 (1980) ("constitutional judgments should not be, or appear to be, merely the subjective views of individual Justices" (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)); *TXO*, 113 S. Ct. at 2725 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 2735-42 (O'Connor, White & Souter, JJ., dissenting). Otherwise, as one court candidly admitted, courts merely substitute their own subjective notions for those of the juries, and the courts' "reaction is admittedly visceral." *Rosenbloom v. Metromedia, Inc.*, 289 F. Supp. 737, 749 (E.D. Pa. 1968), *rev'd on other grounds*, 415 F.2d 892 (3d Cir. 1969), *aff'd*, 403 U.S. 29 (1971). The result is judicial review that is "an imprecise pattern of subjective judicial reactions mixed with some episodes of deference to jury verdicts." *2-D's Logging, Inc. v. Weyerhauser Co.*, 53 Or. App. 677, 688-89, 632 P.2d 1319, 1326, *cert. denied*, 292 Or. 109, 642 P.2d 311 (1981).

Trial court records can be reviewed for a wide variety of objective evidence that will assist a reviewing court in determining whether a punitive damages award is likely to have resulted from passion, prejudice, or consideration of improper factors and whether the award reasonably furthers the legitimate purposes of deterrence and punishment. In several opinions, Members of this Court already have indicated the nature of much such evidence. It only remains for the Court in this case to give more guidance to the lower courts by collectively describing the principal objective factors that judicial review should encompass. This is not to suggest that due process requires reversal whenever any one such factor exists; rather, it is simply to say that the lower courts need to be apprised of the several objective factors that should be considered in assessing the constitutional reasonableness of a punitive damages award. The objective factors that judicial review should take into account include at least the following.

1. *Evidence presented, and arguments made by the plaintiff's lawyer, at trial.*

First, the reviewing court should examine the evidence presented and arguments made to the jury by the plaintiff's lawyer. If the plaintiff's lawyer and witnesses urged the jury to consider an improper factor, and if a punitive damages award resulted, a reviewing court can reasonably assume that there is some likelihood that the argument had its intended effect. *See, e.g., TXO*, 113 S. Ct. at 2738-39 (O'Connor, White & Souter, JJ. dissenting).

Judicial review should be especially attentive to arguments by plaintiffs' lawyers that invite the jury to focus on some aspect of the defendant's status. *See Powell v. Texas*, 392 U.S. 514, 543 (1968) ("Punishment for a status is particularly obnoxious."); *cf. Robinson v. California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold"). Thus, the plurality in *TXO* intimated that "a state practice of permitting juries to rely on a particular factor, such as the defendant's out-state status, would violate due process" and "would likely be subject to challenge on other grounds as well." *TXO*, 113 S. Ct. at 2720 & n.23 (Stevens, J., Rehnquist, C.J. & Blackmun, J.) In this case, for ex-

ample, the jury was reminded that the manufacturer was a Japanese corporation, and the plaintiff's lawyer described his client in closing argument as "a red-blooded 20 year old American boy." Tr. 13:2807. There can be little doubt as to the intended insinuation, and it has no place in a constitutionally fair proceeding.

Similarly, there is an improper focus on a defendant's status when a plaintiff's lawyer emphasizes that the defendant is a corporation. *Cf. TXO*, 113 S. Ct. at 2737 (O'Connor, White & Souter, JJ., dissenting) ("Corporations are mere abstractions and, as such, are unlikely to be viewed with much sympathy."). One of the most common tactics for modern plaintiffs' lawyers is to focus the jury's attention simultaneously both on the corporate nature of the defendant and on the non-resident status of the defendant by repeatedly asking the jury to "send a message" back to the officers or directors of the corporation at its headquarters in some other state. A similar tactic is to emphasize the corporate defendant's status as an insensate entity. One of the country's most prominent plaintiffs' lawyers argues, for example, that a corporation is

> something that does not care or love or have babies of its own—something that does not even breathe. And this "non-breather," shall we call it, had a special kind of blood—it was green, and it was made of money. It sustained itself on money, large amounts of money. It ate money and craved money, more money. More and more money. It lived for money and dreamed of money and even excreted money. . . . Then one day this corporation, this non-breather, discovered a new way to obtain large amounts of money very easily. Do you know what it did?

Spence, *How to Make a Complex Case Come Alive for a Jury*, 72 A.B.A.J., Apr. 1, 1986 at 62, 66.

Another factor that regularly permeates punitive damages proceedings, that appeals to passion and prejudice, and that does not properly promote deterrence or punishment, is evidence of and arguments based on the corporate defendant's total wealth. This Court has recognized the prejudice that a focus on the defendant's wealth is likely to inject into a trial. In upholding Alabama punitive damages procedures against due process attack in *Haslip*, this Court noted with approval that "[a]ny evidence of Pacific Mutual's wealth was excluded from the trial in accord with Alabama law." 499 U.S. at 19. Thus, the Court emphasized, in Alabama "the fact finder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." 499 U.S. at 22. *See TXO*, 113 S. Ct. at 2723 (Stevens, J., Rehnquist, C.J. & Blackmun, J.); *id.* at 2738 (O'Connor, J., dissenting).

The Oregon law applied below provides an excellent, and disturbing, example of the use of the defendant's wealth in a manner antithetical to the rule endorsed in *Haslip*. Oregon law provides that "[p]unitive damages, if any, *shall* be determined and awarded based upon," among other specified factors, "the financial condition of the defendant . . . ." O.R.S. 30.925(3)(f) (emphasis added). The trial court interpreted "financial condition" to mean net worth, allowed Oberg to introduce evidence of Honda's entire net worth of nearly $5 billion, and then charged the jury that it "shall consider [among other specified factors] the financial condition of the defendant." (Tr. 23:2707.)[1] In addition, the net worth evi-

[1] Except for this crucial failing, the jury instructions in this case would have paralleled those in *Hasilp*. The jury in each case was told that the purposes of punitive damages were deterrence and punishment. Each was told that punitive damages were discretionary. In *Haslip* the jury was told to consider "the character and degree of wrong" and the "necessity of preventing similar wrong," and the jury here was told to consider four factors that essentially paraphrased those three factors. *Compare* 499 U.S. at 6 n.1, *with* Tr. 24:2944.

Here, however, these generalized instructions in this case were not supplemented by the protection provided by searching trial court and appellate court review in *Haslip*. As *Haslip* plainly

dence was not admitted for the narrow purpose of *limiting* the punishment so as to prevent financial ruin. *Compare, e.g., Adams v. Murakami*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991). Instead, it was admitted to *increase* the punishment based on the defendants' status.

By allowing the jury to be told a defendant's wealth for the purpose of provoking greater punishment, Oregon law, as interpreted and applied below, deprives punitive damages defendants of one of the major safeguards recognized in *Haslip*. The "financial condition" evidence that was admitted was not limited to the *relevant* financial information—namely, information about any monetary gain that Honda may have realized and expected to realize by using the design that the jury found defective, rather than the design that Oberg claimed should have been used. *See TXO*, 113 S. Ct. at 2721-22 (Stevens, J., Rehnquist, C.J. & Blackmun, J.). The evidence was not even limited to financial information relevant in any other way to the product line in issue—a three-wheel ATV. Instead, the evidence was the nearly $5 billion net worth of the entire parent company and its subsidiaries. That number, of course, included assets derived from and dedicated to numerous other business activities that the defendants engaged in, such as the manufacture and sale of automobiles, motorcycles, four-wheel ATV models, and other products. That number also, of course, included assets derived from sales of products in states other than Oregon, states in which juries had found the product in issue nondefective under their states' laws, *see, e.g., Bittner v. American Honda Motor Co.*, 1993 WL 502774 (Wis. Ct. App. Dec. 9, 1993), as well as from sales of products in other countries, countries that also did not consider the product in issue defective.

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shows, it was the "full panoply" of jury instructions *and* detailed, substantive judicial review that enabled the punitive award in that case to withstand constitutional scrutiny. 499 U.S. at 23.

Thus, the jury was implicitly instructed to base the severity of punishment in large part on assets derived from the defendants' sales of some product lines that had been judicially found, or at least widely considered, nondefective and societally beneficial in Oregon itself and elsewhere, and of a product that, while deemed defective in Oregon, was sold in other jurisdictions where it had been found nondefective or otherwise sufficiently useful so as not to give rise even to an action for compensatory damages.

This failure to require that punitive damages be limited to an amount required to punish and deter conduct only where it violates applicable legal standards is not unique to this case or to Oregon. It is pervasive, and it has arisen in the decades since modern transportation and mass production techniques made interstate and international shipping of manufactured goods the norm, rather than the exception. *Amici's* members include thousands of entities that sell products in interstate commerce, international commerce, or both. Every time a jury in a forum state is allowed to base the size of a punitive damages award against such an entity on a combination of that one state's tort laws and punitive damages laws and the defendant's sales not only in that state, but in all states and countries with laws under which the product is *not* defective, the forum state is thereby allowed to punish the defendant in part for having *complied* with other jurisdiction's laws and for having produced products that other jurisdictions believe provide net benefits for their citizens. Similarly, in states and countries in which the product may be defective, but not sufficiently so as to allow a punitive damages award, the forum state would be basing the amount of punishment in part on conduct considered not deserving of punishment in the jurisdictions where much of the conduct occurred.

The prejudicial effect of evidence of the net worth of a large organization can hardly be overstated. As this Court observed in explaining why punitive damages

should not be permitted against a municipality, "The unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981). And, as recognized in *TXO*, "the emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident." *TXO*, 113 S. Ct. at 2723 (Stevens, J., Rehnquist, C.J., Blackmun, J. & Kennedy, J.). *See id.* at 2738 (O'Connor, J., dissenting) ("the temptation to transfer wealth from out-of-state corporate defendants to in-state plaintiffs can be quite strong").

That same prejudicial impact is even more likely to attend evidence of the wealth of a company the size of Honda, whose annual income greatly exceeds the income of a vast multitude of municipalities. Jurors who vote to award huge damages against their own municipality are fully aware that they themselves will have to shoulder a share of the taxes needed to pay the judgment, and they may temper their verdict accordingly; but most jurors who vote to award huge sums against a private manufacturer are likely to believe that, unless they buy the product model in issue, they will not incur any of the direct cost of the judgment.[2] Even further, in a case like this one, any jury's inclination to redistribute wealth is likely to be exacerbated by knowledge that the wealth will be redistributed not only from a corporation, and not only from an out-of-state corporation, but from a foreign corporation, to a local citizen.

The unacceptability of these prejudicial effects of net worth evidence is sharpened by the now widely recognized fact that a defendant's net worth is irrelevant to

[2] Of course, to the considerable extent that unpredictable, huge punitive awards against some defendants cause all businesses to increase their insurance, their reserves, and their prices, all consumers, including jurors, indirectly pay for unjustified punitive awards.

the determination of the appropriate punishment under any recognized theory of deterrence or retribution. *See, e.g.*, Abraham & Jeffries, *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. Legal Studies 415 (1989); Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. 831, 870-85 (1989); Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919, 950-52 (1989). As succinctly stated by the body of leading legal scholars who, serving as reporters for the American Law Institute's study of the need to amend the Restatement (Second) of Torts, recently filed their findings on this issue:

> In determining the size of the award that is sufficient for [deterrence], what is relevant is not the defendant's *overall* wealth, but rather the profit it realized from the particular tortious activity in question.
>
> * * * *
>
> Use of evidence of the defendant's wealth in calculating punitive damages against organizational defendants therefore cannot be justified even by the rationale of economic deterrence, let alone of retributive punishment. Given that the wealth factor imposes a considerable burden on the litigation process and occasionally prejudices the defendant's right to a fair trial of the underlying liability claims, we recommend that evidence of the wealth of the defendant no longer be admissible in assessing punitive damages for enterprise torts.

Reporters' Study, American Law Institute, *Enterprise Responsibility for Personal Injury*, Vol. II, at 254-55 (1991).[3]

[3] In this case, the trial court's treatment of Honda's net worth improperly prejudiced the jury in yet another way—namely, the court's instructions invited the jury to take Honda's wealth into account in deciding not only the amount of punishment, but whether to punish at all. The trial court told the jury:

> If you decide this issue [the existence *vel non* of wanton disregard for the health, safety, and welfare of others] against

In sum, the jury proceedings below, unlike those in *Haslip*, did not ensure that "the fact finder must be guided by more than the defendant's net worth." *Haslip*, 499 U.S. at 22. Instead, the jury instructions and evidence below *required* the fact finder to be guided in large part by the defendants' net worth, and this was done even though that number resulted from the defendants' diversified operations, many of which were unrelated to the product found defective in this case. Regardless of whether that alone made the punitive damages award "exceed an amount that will accomplish society's goals of punishment and deterrence," *Haslip*, 499 U.S. at 21, it certainly deprived the defendants of a safeguard that this Court in *Haslip* considered important. And it certainly put before the jury evidence that was both prejudicial and irrelevant to the legitimate purposes of punitive damages.

Accordingly, this Court should make clear that the judicial review for reasonableness required by due process should include review sufficient to ensure that any financial information admitted in a punitive damages proceeding has been reasonably limited to financial evidence that is truly relevant to deterrence and punishment—namely, evidence of the gain, if any, that the defendant realized or expected to realize by engaging in the challenged conduct. In a product liability context, this is the profit that the defendant realized or expected to realize by choosing

---

the defendant[s], you may award punitive damages, although you are not required to do so, because punitive damages are discretionary.

In the exercise of that discretion you shall consider evidence, if any, of the following:

* * * *

Number five, the financial condition of the defendant[s].

Tr. 24:2944 (emphasis added).) The "that discretion" referred to is the only discretion mentioned earlier in the instructions—namely, the discretion to award or not to award any punitive damages. This further demonstrates the risks that arise when wealth is introduced into and made a focal point of punitive damages proceedings.

the challenged design or warning in lieu of the alternative design or warning advocated by the plaintiff.

In addition, because the challenged conduct may be deemed tortious in the forum state and yet be considered by other countries or states to provide a net benefit to their citizens and to be not tortious, the profit evidence in a trial in one state should be limited to the profit derived from sales in that state and others in which the product has been found defective. Other states' and other countries' own public policies would be undermined if punitive damages awards in the forum state were used to deter sales in those other states and countries of products that those states and countries approve for their own citizens, either by some form of certification or licensure or by maintaining a tort system under which the product in question is not deemed defective or otherwise actionable. Principles of fundamental fairness, deterrence, and punishment, as well as comity, permit no other rule.

2. *Jury instructions.*

Objective evidence for judicial review of the reasonableness of a punitive damages award also includes the instructions given to the jury. If the jury is not even told the legitimate purposes of punitive damages, the limiting principles dictated by those purposes, and that the award must not exceed that which is necessary to serve those purposes, it is extraordinarily unlikely that the jury will somehow have divined and scrupulously adhered to those purposes, those limiting principles, and that required maximum. It therefore is equally unlikely that the award will be one that is "reasonably related to the goals of deterrence and retribution." *Haslip*, 499 U.S. at 21. *See Gertz*, 418 U.S. at 350 ("In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the act and harm caused.").

Similarly, if the jury was not instructed that the size of a punitive damages award may not be based on the

defendant's corporate nature, out-of-state or foreign citizenship, or other status, the reviewing court has little reason to be assured that those improper factors did not influence the punitive damages verdict. Assurance would be even less likely if such instructions were not given *and* the plaintiff's lawyer invited the jury to focus on one or more improper status factors.

In *Haslip* this Court recognized the due process importance of the interplay between jury instructions and judicial review. The jury instructions there were limited, causing the Court to emphasize that Alabama provided *both* "meaningful and adequate review by the trial court," *Haslip*, 499 U.S. at 20, *and* thorough appellate review based on "comparative analysis" and "detailed substantive standards," *id.* at 21.

3. *Comparative analysis.*

Another source for objective judicial review is a comparison of the punitive damages award in issue to other punitive damages awards, criminal fines for similar and dissimilar conduct, civil penalties for similar and dissimilar conduct, and statutory provisions for double or treble damages for similar conduct. *See TXO*, 113 S. Ct. at 2720 (Stevens, J., Rehnquist, C.J., & Blackmun, J.) (comparative analysis "might, in a given case, be one of many relevant considerations"); *id.* at 2732-33 (O'Connor, J., dissenting) (comparative analysis "can give us some idea of the limits on retribution"). This is especially important because most juries are allowed to make no such comparison, even though comparisons of acts and corresponding punishments are the very essence of the proportionality that both deterrence principles and retributive principles require. *See, e.g., Solem v. Helm*, 463 U.S. 277 (1983); Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 Stan. L. Rev. 838, 845-57 (1972).

In arriving at an award in a particular case, most juries have no other experience against which to measure their decisions. Unlike a court, which can evaluate the

award and the conduct giving rise to it in the context of reported other awards, other awards rendered in the same courthouse, criminal fines imposed by the same court, and statutory fines and penalties, a jury convened to hear one case cannot have a similar perspective. Thus, a jury does not take into account the relationship of the award in the case before it to the awards in other cases, to criminal fines imposed in other cases, or to statutory provisions for fines and civil penalties. Unlike courts, juries cannot measure the punishment in one case against that in other cases in order to ensure that a particular defendant is not being singled out for disparate treatment and subjected to punishment that is out of line with punishments in other cases.

Providing for judicial review of punitive damages awards by a jury does not merely add another decision-maker to consider the same factors as those which the jury considered. Instead, it is a means of making possible an objective mode of analysis—comparison to other awards and judgments, and to statutes—that is critical to an objective determination of reasonableness, that is absolutely necessary to any attempt to achieve proportionality, and yet that juries do not consider. Thus, this form of review contributes significantly to more consistent and equitable results. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (degree and type of procedural protection that is due is dependent, *inter alia*, upon the risk of erroneous deprivation of such interest through the procedures used and probable value of additional or substitute safeguards).

Moreover, this type of judicial review is part of the process that traditionally has been provided under the various states' judicial systems. In *Haslip* this Court cited with approval the "comparative analysis" applied by Alabama reviewing courts in upholding the constitutionality of the Alabama punitive damages procedure. 499 U.S. at 21-22. Many courts have cited with approval precisely such a comparative analysis as the justification for grant-

ing remittitur of punitive damages awards. *See, e.g., Dunn v. HOVIC*, 1 F.3d 1371, 1391 (3d Cir. 1993) (reducing a $25 million punitive damages award to $1 million because, *inter alia*, the award "greatly exceeds the level of punitive damages awarded in other cases"); *DeRance v. PaineWebber, Inc.*, 872 F.2d 1312, 1329 (7th Cir. 1989) (reducing a $20 million punitive damages award to $7 million because "when contrasted to the punitive damages awards in analogous settings, the $20 million punitive damages award against PaineWebber is significantly excessive"); *General Motors Corp. v. Johnston*, 592 So. 2d 1054, 1063-64 (Ala. 1992) (reducing $15 million punitive damages award in products liability wrongful death case to $7.5 million under Alabama's comparative analysis). The frequency with which reviewing courts have found punitive damages awards excessive under a comparative review suggests the importance of such an analysis in assuring that litigants are treated with consistency and fundamental fairness.

4. *Deterrence and retribution factors.*

The reviewing court also can objectively compare the size of the punitive damages award with the harm caused by the defendant's conduct and the potential harm that the conduct might have caused (although rational analysis quite clearly requires that the probability of such potential harm also be taken into account). *TXO*, 113 S. Ct. at 3721-22 (Stevens, J., Rehnquist, C.J. & Blackmun, J.); *id.* at 2725 (Kennedy, J. concurring in part and concurring in the judgment); *id.* at 2729-31 (O'Connor, J., dissenting). The reviewing court also can examine the nature of the wrongful activity in which the defendant allegedly engaged. *Id.* at 2726 (Kennedy, J., concurring in part and concurring in the judgment). If, for example, the conduct consisted of fraud that greatly increased the likelihood of the defendant's successfully realizing an illegal gain, a substantial punitive damages award might be appropriate. *See, e.g., Ellis, Fairness and*

Efficiency in the Law of Punitive Damages, 56 So. Cal. L. Rev. 1, 20-33 (1982).

In *Haslip* this Court upheld Alabama's punitive damages procedures against due process attack in part because Alabama had specified similar factors to be considered on judicial review, including (1) the "culpability of the defendant's conduct," (2) the "desirability of discouraging others from similar conduct," (3) the "impact upon the parties," and (4) "other factors, such as the impact on innocent third parties." 499 U.S. at 20 (quoting *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1379 (Ala. 1986)). Those, too, are objective factors that can and should be examined in a determination of the constitutional reasonableness of a punitive damages award.

Unfortunately, many lower courts have ignored *Haslip*'s mandate for detailed and objective judicial review based on factors such as those described above. In *MGW, Inc. v. Fredricks Development Corp.*, 12 Cal. App. 4th 244, 254-55, 6 Cal. Rptr. 2d 888 (1992), for example, the California Court of Appeal held that trial court review of punitive damage verdicts could be omitted altogether. The court also determined that the California standards for appellate review of punitive damage awards complied with *Haslip*, even though in California "a punitive damages award will be set aside only when it is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice." *Id.* at 103 (internal quotation marks omitted). Similarly, in *Latham Seed Co. v. Nickerson American Plant Breeders, Inc.*, 978 F.2d 1493 (8th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S. Ct. 3037 (1993), the Eighth Circuit held that the Iowa standard of review, which permits reversal of punitive damages awards "only if it is a plain injustice or a monstrous or shocking result," comports with the *Haslip* requirements for judicial review. 978 F.2d at 1499-1501.

Even those courts that have remitted punitive damage awards have done so generally with little regard to the

Haslip post-verdict review requirements. For example, in *Mason v. Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991), *cert. denied*, —— U.S. ——, 112 S. Ct. 1941 (1992), the Tenth Circuit reduced a punitive damage award from $25,000,000 to $12,500,000, finding simply that this award was "so excessive as to shock our judicial conscience," *id.*, at 1561, but not discussing any of the factors considered in arriving at this decision or explaining how the $12,500,000 remitted award was less shocking or more justifiable than the jury's original verdict. *See also State Farm Mut. Auto Ins. Co. v. Zubiate*, 808 S.W.2d 590, 605 (Tex. Ct. App. 1991) ("Is the evidence factually sufficient to support the trial court's judgment upholding the jury award of $15 million in punitive damages against Appellant? Our answer is no, but why? *Because it just is.*") (emphasis in original).

Lower courts are engaging in a post-verdict review process bearing little resemblance to the process approved by this Court in *Haslip*. Awards are affirmed based upon the judges' highly subjective notions of what constitutes good domestic, and sometimes even foreign, policy. For example, one trial court in a tortious interference action arising from a domestic commercial contract dispute recently affirmed an award on the grounds that, *inter alia*, "[the defendant's] conduct incrementally damages the United States in its present struggle to remain a global economic power." *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 810 F. Supp. 1520, 1530 (W.D. Okla. 1992).

In sum, *Haslip* and *TXO* make clear that due process requires judicial review for reasonableness of punitive damages awards. Review in the lower courts, however, remains largely subjective and limited. This case presents the extreme: no judicial review at all of the size of the award. As a result, punitive damages awards continue to "run wild." *Haslip*, 499 U.S. at 18. This Court should make clear that judicial review must be for reasonableness and must be objective, taking into consideration the several objective factors described above.

CONCLUSION

The judgment below should be reversed, and the case should be remanded for redetermination of punitive damages in accordance with guidelines prescribed by this Court.

Respectfully submitted,

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No. 93-644

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD.; AND AMERICAN HONDA MOTOR CO., INC.,
Petitioner,

v.

KARL L. OBERG,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amicus will address the following question:

Whether Oregon's prohibition against post-verdict judicial review of the amount of jury punitive damages awards violates due process under the Fourteenth Amendment.

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IN THE
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No. 93-644

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD.; AND AMERICAN HONDA MOTOR CO., INC.,
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v.

KARL L. OBERG,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C. with over 100,000 members and supporters nationwide. WLF regularly appears before federal and state courts promoting economic liberty, free enterprise principles, and a limited and accountable government. WLF's Legal Studies Division also publishes monographs and other publications on these topics.

In particular, WLF has devoted substantial resources over the years through litigation and publishing to promote civil justice reform, including tort reform and opposing excessive punitive damages and attorney's fees awards.

See, e.g., TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Farrar v. Hobby*, 113 S. Ct. 566 (1992); Stephen M. Turner, et al., *Punitive Damages Explosion: Fact or Fiction?* (Washington Legal Foundation Working Paper No. 50, 1992); Victor E. Schwartz, *Punitive Damages: Should The Constitution Of The United States Provide Boundaries?* (Washington Legal Foundation Legal Backgrounder, 1989); Theodore B. Olson and Theodore J. Boutrous, *The Constitutionality of Punitive Damages* (Washington Legal Foundation Legal Backgrounder, 1989). Excessive and unpredictable punitive damages awards are ultimately harmful to the economy, workers and consumers.

WLF believes that it can bring a broader perspective on the issues presented in this case which will assist this Court in deciding the case in such a way as to give clearer guidance to state courts on the imposition and judicial review of punitive damage awards. By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

STATEMENT OF THE CASE

Amicus Curiae is, in the interest of brevity, omitting any detailed statements of the facts of this case. Amicus adopts by reference the statement of facts contained in Petitioner's Brief.

In brief, Respondent was injured while operating a three-wheeled all-terrain vehicle manufactured, distributed, and sold by Petitioners Honda Motor Co. Ltd., Honda R&D Co., Ltd, and American Honda Motor Co., Inc. (collectively "Petitioners" or "Honda"). Respondent subsequently brought suit in Oregon state court seeking compensatory and punitive damages.

During a jury trial, evidence was introduced that Petitioners' net worth was $4.9 billion. Respondent's counsel argued that the jury should award punitive

damages against Petitioners in the amount of "one-tenth of one percent of their net worth . . . $4.9 million" and the court later instructed the jury to consider Petitioners' net worth in its assessment of punitive damages. The jury found Petitioners liable under strict liability for defective design of the product and failure to warn and awarded Respondent $919,390.39 in compensatory damages and $5 million in punitive damages.[1] Because the jury found Respondent 20% at fault, the court reduced the compensatory award to $735,512.31 under Oregon's comparative negligence statute; however, no reduction was made to the punitive damages award.

Honda filed motions for new trial and judgment notwithstanding the verdict on several grounds, including that the jury awards of compensatory and punitive damages were excessive.[2] The trial court denied Petitioners' motions without explanation.

Petitioners' subsequent appeals to both the Oregon Court of Appeals and to the Oregon Supreme Court on the grounds that the punitive damages award was excessive were rejected on the basis that Article VII, Section 3, of the Oregon Constitution prohibits review of the amount of punitive damages awards.[3] Both courts also held that due process does not require post-verdict review of the size of punitive damages awards.

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[1] The trial court instructed the jury that punitive damages were not to exceed $5 million (Trial Tr. 2945). This was presumably because Respondent was limited to that amount as set forth in the *ad damnum* clause of his amended complaint.

[2] Amicus understands that Petitioners will address both the award of compensatory and punitive damages. This brief will focus only on the award of punitive damages.

[3] Oregon Const. art. VII, § 3 (1991) provides, in pertinent part, "In actions at law, where the value in controversy shall exceed $200, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is evidence to support the verdict."

SUMMARY OF ARGUMENT

In recent terms, this Court has had occasion to consider the applicability of the due process clause of the Fourteenth Amendment to punitive damages awards. *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). In both *TXO* and *Haslip* this Court affirmed that the due process clause provides some limit to the size of punitive damages awards and stated that an award that was not reasonable in its amount or rational in light of its purpose to punish wrongful conduct and to deter its repetition would offend due process.

This Court held in *Haslip* and *TXO* that the awards of punitive damages under the particular facts of those cases did not violate either procedural or substantive due process. However, in both cases, the punitive damages awards were found not to violate due process in large part because of the availability and quality of post-verdict review of the punitive damages awards.[4] In sharp contrast, by not providing for *any* post-verdict review on the amount of punitive damages awards, Oregon has eliminated the only meaningful procedural safeguard against excessive punitive damage awards for due process purposes. While punitive damages may serve a legitimate state interest in punishing and deterring certain conduct, this Court recognized in *Haslip* and *TXO* that punitive damages also carry the potential for extreme unconstitutional deprivations.

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[4] In *Haslip*, Alabama provided a post-verdict hearing which required the trial judge to articulate specifically his or her reasons for setting aside a punitive damage award or refusing to do so. Thereafter, an appellate court reviewed the award in accordance with established objective criteria, providing an additional check on the jury's discretion. In *TXO*, West Virginia also had a system of both trial and appellate level review.

Post-verdict review of jury damage awards, including punitive damages, is deeply ingrained in our jurisprudence -- and for good reason. Post-verdict review at both the trial and appellate court levels provides a unique and important safeguard against a jury award improperly based on passion, prejudice or bias. Oregon's system of punitive damages, which dispenses with the most basic and traditional common law procedural safeguards, offends due process and should be declared unconstitutional.

Moreover, Amicus' empirical survey of cases decided in 1993 (appended to this brief) shows that upon judicial review, approximately 54% of jury punitive damages awards were modified or upset in some manner, either because the punitive damages award was stricken, or was vacated and remanded, or was reduced in amount, or some combination thereof. Prior published studies discussed *infra* have presented similar data, leading to the conclusion that post-verdict review of jury punitive damages awards by experienced trial and appellate judges is a necessary safeguard for a determination that is plainly subject to error, including on the ground of undue excessiveness. The safeguard of post-verdict review of punitive damages awards is not merely an abstract principle, but an essential element of our jurisprudence in practice.

Of particular concern to Amicus is the consideration given to the wealth or financial condition of the defendant by juries awarding punitive damages. Wealth, especially corporate wealth, is a complex subject which can be easily manipulated to exaggerate the true financial condition of the relevant corporate defendant. This is compounded by the fact that courts may apply different definitions of "wealth" for punitive damages purposes. Moreover, in the context of products liability suits, as in the present case, a single manufacturer may be subject to multiple punitive damages awards for the same course of conduct, making the wealth factor even more illusory.

This Court has recognized that consideration of defendant's wealth increases the risk that an award of

punitive damages will be improperly influenced by prejudice. Evidence of wealth can cause juries to focus on the financial resources of the defendant to the exclusion of all other factors. This is especially the case where the defendant is a large out-of-state corporation or, as here, a foreign corporation. Thus, juries may fall prey to deceptively simplistic and often emotional requests for punitive awards that are a "mere fraction" or a "small percentage" of defendant's wealth, as was the case here. Arithmetically, however, such requests can translate into multi-million dollar punitive damages awards that exceed by several orders of magnitude any amount that could conceivably meet the legitimate goals of punishment and deterrence. While consideration of wealth in and of itself may not violate due process, the serious risk that such evidence will prejudice the jury heightens the need for adequate procedural safeguards at both the trial and post-verdict level against improperly based awards.

In sum, definite and meaningful post-verdict review of punitive damages awards is the only way to assure that a jury's discretion is exercised with reasonable constraints so as to satisfy due process.

ARGUMENT

I. POST-VERDICT REVIEW OF PUNITIVE DAMAGES AWARDS IS A FUNDAMENTAL REQUIREMENT OF DUE PROCESS

A. Post-Verdict Review Has Historically Been Recognized As A Check On Excessive Punitive Damages Awards

An historical review of case law reveals that jury damage awards, including those for punitive damages, have traditionally been subject to the safeguard of post-verdict

judicial review.[5] *Accord* G.W. Field, *The Law of Damages* 65 (1876) ("the only check" on a jury's discretion in awarding punitive damages is the power of the court to set aside the verdict where the jury was unduly influenced by passion or prejudice); J. Sutherland, *Law of*

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[5] At common law, a court could set aside a jury verdict and order a new trial if the jury damage award was excessive, or unduly influenced by prejudice, passion or improper motives. *See Wood and Gunston*, 82 Eng. Rep. 867, 867 (1655); *Hewlett v. Cruchley*, 128 Eng. Rep. 696, 698 (1813); *Chesapeake and Ohio Canal Co. v. Knapp*, 34 U.S. 541, 570 (1835); *Kendall v. Stone*, 2 Sand. 269, 287 (N.Y. Super. Ct. 1848) (punitive damages); *Burkett v. Lanata*, 15 La. Ann. 337, 340 (1860) (punitive damages); *McCarthy v. Niskern*, 22 Minn. 90, 91 (1875) (punitive damages); *Simmons v. Fish*, 97 N.E. 102, 103 (Mass. 1912) ("It is a constitutional incident of trial by jury, which cannot be taken away by legislative action, that the assistance and protection of the presiding judge shall be available to the litigants in setting aside verdicts not so supported by law and evidence that they ought to stand.").

Moreover, our courts have long endorsed conditioning the denial of defendant's new trial motion on plaintiff's agreement to remittitur. *See Fury v. Stone*, 2 Dall. 184 (Pa. 1792); *Blunt v. Little*, 3 F. Cas. 760, 762 (1822); *Belknap v. Boston & Maine R.R.*, 49 N.H. 358, 374 (1870) (court ordered a new trial conditioned on remittitur, in part because "in assessing the exemplary damages, [the jury] was affected by some improper influences. . . ."); *Hansen v. Boyd*, 161 U.S. 397, 411 (1896) (appellate court, in reviewing judgment, can condition granting a new trial on remittitur).

Dating before 1868, trial and appellate courts have also ordered new trials based solely on the issue of damages. *See Davenport v. Bradley*, 4 Conn. 309, 311 (C.C. 1822) (No. 1578); *Boyd v. Brown*, 17 Pick. 453, 461 (Mass. 1835) (because the jury award was excessive, the court granted a new trial solely on the issue of damages). Since that time, courts have continued to grant new trials solely on the issue of damages. *See Simmons v. Fish*, 97 N.E. 102, 104 (Mass. 1912) (an appellate court could grant a new trial on a single issue "as a part of its inherent judicial authority"); *Norfolk Southern R. Co. v. Ferebee*, 238 U.S. 269 (1915); *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931).

Additionally, appellate courts have traditionally reviewed trial court damage awards. *See Parsons v. Bedford*, 28 U.S. 433, 447-48 (1830) (appellate review of issues of law); *Phillips & Colby Constr. Co. v. Seymour et al.*, 91 U.S. 646, 656 (1875) (because the verdict was not responsive to any issue raised by the pleadings, the appellate court set aside the verdict conditioned on defendant agreeing to remittitur).

Damages 742 (1882) (court can set aside an excessive punitive damages award); Theodore Sedgwick, *Measure of Damages* 537-538 n.1 (1868) ("in cases proper for exemplary damages . . . the court may exercise the power it always possesses to grant a new trial for excessive damages.").

In *Haslip*, this Court characterized the common law approach to punitive damages:

> Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.

Haslip, 499 U.S. at 15. *See also id.* at 26 (Scalia, J., concurring) (quoting Field, *supra*, at 65); *TXO*, 113 S. Ct. at 2729-30 (O'Connor, J., dissenting) ("courts at common law in England traditionally would strike any award that appeared so grossly disproportionate as to evidence caprice, passion, or bias. This practice has long been followed in this Nation as well.").

Thus, premising the constitutionality of a jury award of punitive damages on its common law origins requires acknowledgement that post-verdict judicial review of such an award was historically available as a safeguard against excessiveness.[6] Indeed, in both *Haslip* and *TXO* this Court upheld the respective procedures of both Alabama and

[6] In *Haslip*, this Court relied on the common law origins of punitive damages awards in finding that due process was not violated. *Haslip*, 499 U.S. at 15-18. Justice Scalia's concurring opinion also extensively analyzed the common law history of punitive damages awards. *Id.* at 24-40 (Scalia, J., concurring).

West Virginia in large measure because of the availability and quality of post-verdict review.[7]

This Court's careful attention to the post-verdict review procedures in both *Haslip* and *TXO* belies any contention that trial procedures alone are sufficient to meet the requirements of due process. As summed up by Justice Scalia in his concurring opinion in *TXO*, "'procedural due process' requires judicial review of punitive damages awards. . . ." *TXO*, 113 S. Ct. at 2727 (Scalia, J., concurring).

By prohibiting post-verdict review of jury punitive damages awards for excessiveness, Oregon has chosen a path that sharply departs from an "ancient" procedure that provides litigants with a fundamental safeguard against improperly grounded and potentially devastating monetary judgments. *See Twining v. New Jersey*, 211 U.S. 78, 101 (1908) ("Consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles. . . ."). To our knowledge, Oregon stands alone in this regard.[8]

[7] *See Transportation Ins. Co. v. Moriel*, D-1507, 1994 Texas LEXIS 23, *59 (Tex. Feb. 2, 1994) (the court found that "[t]he broad jury discretion that is the hallmark of the common law punitive damages system must be complemented by procedural safeguards that will ensure against excessive or otherwise inappropriate awards").

[8] Significantly, prior to the 1910 amendment to Article VII, Section 3 of its Constitution, Oregon also provided for post-verdict review of jury damage awards, codifying the common-law procedure by statute:

> The former verdict or other decision may be set aside and a new trial granted, on the motion of the party aggrieved, for any of the following causes materially affecting the substantial rights of such party:
>
> * * * * *
>
> 5. Excessive damages, appearing to have been given under the influence of passion or prejudice.

Or. Stat. Ann. § 174 (1902).

Oregon's prohibition against any post-verdict review of the amount of a punitive damages award must also fall in the face of the conclusions in both *Haslip* and *TXO* that a punitive damages award can be so excessive as to violate substantive due process. Accordingly, post-verdict review is required *at a minimum* to determine whether even a properly instructed jury has made so outrageous an award of punitive damages as to violate due process.

B. Review of Punitive Damages Awards Should Be Available At Both The Trial And Appellate Court Levels

Post-verdict review by both trial and appellate courts is important to ensuring that unconstitutionally excessive punitive damages awards are not permitted to stand. Trial and appellate level review provide fundamentally different, but complementary functions.

The trial judge, who has heard all the evidence and arguments of counsel, has observed the witnesses, and has instructed the jury, is in the best position to determine whether a jury punitive damages award is unduly excessive or is otherwise based on prejudice or other improper motive. *See TXO*, 113 S. Ct. at 2720, 2724. In addition, the trial judge can draw on his experience and knowledge of other cases to test the rationality of the amount of punitive damages arrived at by the jury.[9] Thus, in *Haslip*, this Court was reassured by Alabama's post-trial review which "ensures meaningful and adequate review by the

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[9] Moreover, the policies underlying punitive damages make such awards analogous to an equitable remedy, which is traditionally within the province of the court to decide. In a recent case, the Supreme Court of Kansas upheld the constitutionality of a state statute that provided for the trial judge to set the amount of punitive damages once the jury finds that such damages should be awarded. *Smith v. Printup*, No. 67,591, 1993 WL 540020 (Kan. Dec. 30, 1993) (Kansas Supreme Court found that there was no common law right to a jury determination of the amount of punitive damages, which may be regarded as equitable in nature).

trial court whenever a jury has fixed the punitive damages." *Haslip*, 499 U.S. at 20.

Appellate review provides an additional check on the jury's or trial court's discretion. *See id.* at 20. In *Haslip*, this Court noted with approval that the Alabama Supreme Court applied detailed substantive factors in evaluating the punitive damages award. In recognizing the role of appellate review, the Court found that "[t]his appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Id.* at 21.

Moreover, appellate courts bring a broader perspective to bear on the issue of punitive damages which has wide-ranging implications, especially, for example, in product liability and mass tort cases. Hearing appeals from a number of trial courts gives appellate judges greater insight from a policy viewpoint to determine whether the amount of a punitive damages award is rational in fulfilling the goals of punishment and deterrence. Thus, in *Haslip*, this Court noted with approval:

> The Alabama Supreme Court's post-verdict review ensures that punitive damage awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages.

Id. at 22.

In view of the potential for extreme deprivations caused by punitive damages awards, fundamental fairness should accord litigants with the full measure of traditional safeguards provided by both trial and appellate level review.

C. Empirical Surveys of Judicial Decisions Demonstrate The Critical Need For Post-Verdict Judicial Review Of Punitive Damages Awards In Practice

Post-verdict judicial review of punitive damages awards is not merely an abstract safeguard, but one that has significant practical importance in our system of administering justice. Data from empirical surveys of the application of post-verdict review demonstrate that trial and appellate courts frequently find it necessary to strike, vacate and remand, reduce, or otherwise modify jury punitive damages awards.

To illustrate the impact of post-verdict review on recent punitive damages awards, Amicus surveyed 1993 state and federal judicial decisions in which trial and appellate courts reviewed jury awards of punitive damages.[10] The survey identified 284 such decisions. In 54% of these decisions, the jury awards were either stricken, remanded, or reduced. For the 84 awards of $1 million or more, 64% were stricken, remanded, or reduced. Moreover, for the 31 awards of $5 million or more, 74% were stricken, remanded, or reduced. App. 2a.

While Amicus' survey provides only a "snapshot" of one year of judicial decisions, it demonstrates that, notwithstanding the traditional deference accorded to jury verdicts, trial and appellate judges are frequently compelled to correct errors in punitive damages awards. Thus, from a practical perspective, the trial process of awarding punitive damages is highly prone to error, both

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[10] The survey was conducted by a computerized search through the Westlaw® database to identify 1993 judicial decisions in which jury punitive damages awards were reviewed by a trial or an appellate court. The search parameters used and the data generated from this survey is appended to this brief. The summary chart and case tables dramatically show the importance of post-verdict review both on an overall and on a case-by-case basis. *See* App. 1a-22a.

in deciding to award punitive damages as an initial matter, and in setting their amount.

Other surveys have reported similar data. For example, one leading commentator reported in a 1983 article that

> [o]ut of forty-five reported cases decided by the New York appellate courts in the last decade in which the court either determined whether there was sufficient evidence of malice to support any punitive award or determined whether the jury had awarded an excessive amount of punitive damages, thirty-five punitive damage awards were remitted or reversed.

Malcolm E. Wheeler, *The Constitutional Case For Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 288 (1983) (footnote omitted). The commentator concluded that

> [i]n view of the narrow scope of appellate review, these data show that appellate courts believe that jurors in punitive damages cases often reach erroneous results and are influenced by improper considerations.

Id.

Another commentator, in an article defending the imposition of punitive damages in product liability cases, concluded that there is no punitive damages crisis, in part because "both trial and appellate court judges scrutinize punitive damages awards carefully and modify punitive damages awards in the majority of appeals." Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1, 54 (1992). Moreover, that

commentator's analysis of cases reported during the period 1965-1990 shows that punitive damages awards were upheld only 25% of the time. *Id.* at 55.

The frequency with which trial and appellate judges find it necessary to overturn or modify jury punitive damages awards is impossible to ignore. Apart from demonstrating that there is something fundamentally wrong with the way juries impose punitive damages, the above data illustrate that Oregon's removal of the most important check on unbridled jury discretion denied Petitioners their fundamental right to due process.

II. CONSIDERATION OF DEFENDANT'S WEALTH IN DETERMINING THE AMOUNT OF PUNITIVE DAMAGES HEIGHTENS THE NEED FOR POST-VERDICT REVIEW FROM THE STANDPOINT OF DUE PROCESS

A. This Court Recognizes That Consideration Of Wealth Increases The Risk That A Punitive Damages Award Will Be Improperly Influenced By Prejudice

Of the many factors that state trial courts permit juries to consider in arriving at the amount of punitive damages, evidence of the defendant's wealth is potentially the most prejudicial. Corporate "wealth," involving dollar values in the millions, and even billions, is easily manipulated into superficially rational-sounding punitive damages awards, particularly in the context of product liability suits. The influence of such evidence, coupled invariably with highly emotional appeals to deliver an award that "sends a message," is inescapable. *See* Trial Tr. at 2927. In the present case, for example, evidence was introduced that Honda's net worth was $4.9 billion. During summation, Respondent's counsel seized on that figure as the *only* basis for assessing an *amount* of punitive damages:

> There's a very good reason why you were told and this is an undisputed fact, that Honda has a net worth of $4.9 billion, yes with a B, dollars. Our request to you is that you order Honda to pay one-tenth of one percent of their net worth in punitive damages, and that is $4.9 million.[11]

Trial Tr. at 2838. The Oregon trial court thereafter instructed the jury, among other things, that it "shall" consider "the financial condition of the defendant" in deciding punitive damages.[12] *Oberg v. Honda Motor Co., Ltd.*, 851 P.2d 1084, 1095 n.11 (Or. 1993).

In *TXO*, this Court acknowledged the significance of permitting the jury to consider the "wealth of the wrongdoer" in determining the measure of punitive damages:

> We agree with TXO that the emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a non-resident.

TXO, 113 S. Ct. at 2723.

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[11] During rebuttal, Respondent's counsel increased his request to $5 million: "Think $5 million. How long will Honda or any other company that size remember a $5 million verdict? One-tenth of one percent of their worth." Trial Tr. at 2927.

[12] Oregon recognizes that wealth is a potentially prejudicial factor and accordingly limits the introduction of such evidence at trial. Thus, Oregon law provides that "evidence of the defendant's ability to pay shall not be admitted unless and until the party entitled to recover establishes a prima facie right to recover under subsection (1) of this section." Or. Rev. Stat. § 30.925(2) (1991). Although it is not stated in the opinions of the Court of Appeals of Oregon and the Oregon Supreme Court, apparently the trial court found that a prima facie case had been made, supporting the introduction of evidence of Honda's wealth.

Similarly, in *Haslip*, this Court found it noteworthy that evidence of the defendant's wealth was excluded from the trial in accordance with Alabama law.[13]

> While punitive damages in Alabama may embrace such factors as the heinousness of the civil wrong, its effect upon the victim, the likelihood of its recurrence, and the extent of defendant's wrongful gain, the fact finder must be guided by more than the defendant's wealth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket.

Haslip, 499 U.S. at 22.

In *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), this Court also recognized the prejudicial impact that evidence of wealth can have on the size of punitive damages awards in holding that municipalities were immune from punitive damages under 42 U.S.C. § 1983. The Court expressed concern about the prejudicial impact that evidence of a municipality's wealth could have on the size of a punitive damages award:

> Because evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded, the unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizeable award. The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial, and we are sensitive to the possible strain on local treasuries and therefore on services available to the public at large. Absent a compelling reason for approving such an award,

[13] In Alabama, evidence regarding the "financial position" of the defendant is only considered during appeal to the Alabama Supreme Court to assist in determining whether the award was excessive or inadequate. *Haslip*, 499 U.S. at 21-22.

> not present here, we deem it unwise to inflict the risk.[14]

Id. at 270-71 (footnotes omitted).

In her dissenting opinion in *TXO*, Justice O'Connor brought into focus the ways in which evidence of wealth can prejudice juries. In particular, Justice O'Connor identified the possibility that juries can be urged to consider the wealth of the defendant to the exclusion of all other factors. *See TXO*, 113 S. Ct. at 2738 (O'Connor, J., dissenting) (plaintiff's counsel's argument was "a plea for the jury to award punitive damages based exclusively on TXO's wealth"). As Justice O'Connor also observed, when combined with the status of the defendant as an out-of-state corporation, evidence of wealth can lead to devastating punitive damages awards:

> Given the absence of another plausible explanation for this monumentally large punitive damages award, I believe it likely, if not inescapable, that the jury was influenced unduly by TXO's out-of-state status and its large resources.

Id. at 2739. In addition, evidence of the financial status of a large corporation may cause juries to base punitive damages awards on an improper effort to transfer wealth from defendant to plaintiff. *Id.* at 2737.

Moreover, it is misleading and inaccurate to present to the jury a defendant's overall financial "resources" as if it were a "pie" from which a slice should be taken in the form of a punitive damages award. This is particularly the case where, as here, a large corporation is a defendant

[14] *See also* Clarence Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1187, 1191 (1931) (prejudicial impact of wealth evidence); Kenneth S. Abraham and John C. Jeffries, Jr., *Punitive Damages and the Rule of the Law: The Role of Defendant's Wealth*, 18 J. of Legal Stud. 415 (1989) (arguing against admission of wealth evidence).

in a typical products liability action involving a mass marketed product.

Undoubtedly, a large corporation is likely to have an impressive balance sheet, the figures of which represent enormous sums of money to the average juror. Such an image, however, distorts the true picture of the modern corporation, which is likely to employ thousands of people, support the economies of many communities and provide a variety of useful and necessary products and services for consumers and businesses. Most importantly, in the case of a diversified corporation, corporate wealth is generated from a host of products and activities that may be completely unrelated to the one accused. Thus, having a jury focus on a corporation's *entire* financial wealth as the source for a punitive damages award where the conduct at issue may involve only one of the corporation's many activities completely distorts the purpose of punitive damages awards.[15]

The potential for a corporate defendant's great wealth to stoke the fires of a jury's passion, leading to an unconstitutionally excessive punitive damages award, can only be checked by the more sober review that a trial or appellate court can bring to bear. While we do not submit that the mere consideration of a defendant's wealth in determining punitive damages violates due process, the use

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[15] Significantly, this is the first products liability case in which this Court is addressing the due process implications of punitive damages. Petitioners were found liable for strict liability design defect and failure to warn, not the type of malicious conduct that Justice Kennedy found supported the enormous punitive damages award in *TXO*. *TXO*, 113 S. Ct. at 2726 (Kennedy, J., concurring) ("TXO acted with malice. This was not a case of negligence, strict liability or *respondeat superior*. . . . A case involving vicarious liability, negligence, or strict liability might present different issues.").

Moreover, the jury determined that Respondent was 20% at fault for the accident that caused his injuries. For Respondent to also recover a punitive damage award based on a percentage of Petitioners' wealth under these circumstances is incongruous.

of such evidence underscores the need for adequate procedural safeguards to protect against the potential for jury punitive damages awards premised on prejudice. *See id.* at 2737-38 ("This is not to say that consideration of a defendant's wealth is unconstitutional. . . . Nonetheless, courts must have authority to recognize the special danger of bias that such considerations [as wealth] create."). Where, as here, evidence of Petitioners' wealth was essentially the sole basis for determining the amount of its punitive damages award, Oregon's prohibition against post-verdict review violated due process.

B. Wealth Is A Complex Factor That Makes The Need For Post-Verdict Review Even More Compelling From The Standpoint Of Due Process

An assessment of wealth, and in particular corporate wealth, is an extremely complex concept. As one commentator noted:

> Because the defendant's wealth is a relevant factor in determining the amount of punitive damages, one must inquire what 'wealth' really means in the case of a manufacturing entity. Basic financial sheet data such as sales, profits, and net worth most often have been regarded as the relevant indicators of a corporation's 'wealth.' Yet figures on a company's sales are often largely unrelated to a company's true financial prosperity, for very little of the gross earnings remains - even when times are good - after deducting the costs of materials, labor, sales administration, taxes, and increasingly, the cost of capital. Even profits after taxes are plainly not idle wealth, because the enterprise will fail if the owners do not receive a fair return on their investment. And even after the payment of dividends, although such retained 'profits' may travel to the balance

> retained 'profits' may travel to the balance sheet adding to net worth, the remaining dollars hardly represent a pot of idle gold, ripe for plucking by the plaintiff and his lawyer, for usually they will be reinvested in plant, equipment, salaries, and other future costs of operation - 'the costs of staying in business.'

David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 19-20 (1982) (footnotes omitted). *See also Europlast Ltd. v. Oak Switch Systems, Inc.*, 10 F.3d 1266, 1271 (7th Cir. 1993) (citation omitted) (the court noted that determining a party's solvency "requires a factual review of the [parties'] financial condition and the application of complex and sometimes conflicting accounting practices and valuation theories"); *Jersild v. Aker*, 775 F. Supp. 1198, 1201 (E.D. Wis. 1991) ("ascertaining the 'market value' of the shares of a closely-held corporation requires complex - and perhaps subjective - financial analysis. . . .").

Additional complications arise in determining whether a defendant's "gross" or "net" financial resources are to be submitted to the jury and how those terms are defined.[16] If net wealth is the appropriate inquiry, then determining what deductions must be made from gross financial resources to arrive at net wealth further complicates the use of wealth evidence. Related to this issue is the extent to which, if any, a corporate parent's financial resources should be considered in assessing punitive damages against

[16] In a very recent case, the Ninth Circuit Court of Appeals reversed and remanded a jury punitive damage award of $3.6 million, in part because the evidence of defendant's financial condition was based on the "gross," instead of the "net," revenues it derived from the wrongful conduct. *Boyle v. Lorimar Productions, Inc.*, Nos. 91-56381, 91-56488, 1994 WL 4598, at *2 (9th Cir. Jan. 11, 1994). Under California case law, only net revenue is relevant to punitive damages.

a subsidiary. While it may be superficially appealing to include the financial resources of related corporations in assessing the named corporate defendant's wealth, such a practice ignores the nature of corporate identity and form and may be fundamentally unfair given the facts of the case.

Jurors are not likely to comprehend the myriad adjustments to financial data necessary to fairly and accurately assess a corporation's financial status. Moreover, the fact that a corporation's wealth may be valued in the millions, if not billions, of dollars adds to the risk that the sensibilities of jurors may be overwhelmed by such enormous sums of money. Consequently, evidence of extremely large dollar figures, combined with sophisticated financial arguments, "may all begin to blur in the minds of many jurors." Owen, *supra*, at 20. As a practical matter, jurors may thus become receptive to the simplest argument available -- that the punitive damages award should be based on an arbitrarily selected percentage of defendant's "wealth." All of this underscores why the broad discretion traditionally accorded to juries must be complemented by appropriate procedural safeguards, including post-verdict review.

The significance of the wealth factor is underscored by the fact that almost all jurisdictions permit juries to consider evidence of defendant's wealth when determining punitive damages.[17] Notably, the clear majority of these jurisdictions recognize the potential prejudice of wealth evidence by providing trial-level procedural safeguards such as requiring plaintiff to first make a threshold

[17] Our analysis shows that only Alabama, Kentucky, Michigan and Nebraska clearly prohibit the jury from hearing wealth evidence.

showing of entitlement to punitive damages or by bifurcating the proceedings.[18]

However, trial-level procedures, which only determine whether juries may hear evidence of wealth, do not prevent even properly instructed juries from basing punitive damages awards on bias or prejudice. Significantly, all states, with the sole exception of Oregon, additionally provide for post-verdict review of the amounts of jury punitive damages awards. Such review is critical to ensure that unduly excessive punitive damages are not assessed.

C. The Degree Of Potential Deprivation Compels Post-Verdict Review of Punitive Damages Awards

This Court has recognized that the degree of safeguards required by due process is related to the degree of potential deprivation. *See Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). *See also Haslip*, 499 U.S. at 46 (O'Connor, J., dissenting) ("Our scrutiny under the vagueness doctrine intensifies, however, in proportion to the severity of the penalty imposed.") (quoting *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-499 (1982)). Introduction of evidence regarding the defendant's wealth undoubtedly leads to the potential for extremely large and prejudicially-based punitive damages awards. The all too common resort to fixing punitive damages based on a relatively "small" percentage of a corporation's wealth can easily lead to an outrageously excessive award in terms of what is appropriate for punishment and deterrence.[19] This is especially the case

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[18] An annotated analysis of how each of the fifty states as well as the District of Columbia, the Virgin Islands, Puerto Rico and Guam treat wealth evidence is set forth in the appendix to this amicus brief. App. 23a-26a.

[19] For example, a punitive damage award based on just 1% of the wealth of a corporation "valued" at $1 billion will automatically yield a $10 million award.

state corporation, or as here, a foreign corporation, whose "wealth" is valued in the billions.[20]

Oregon's decision to dispense with any post-verdict review is therefore especially egregious when the defendant's wealth must be considered in fixing the amount of the award. As this Court stated in *Mathews*, "the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any . . . decisionmaking process." *Matthews*, 424 U.S. at 341. Removing the check of post-verdict review on jury prejudice and bias while allowing wealth to serve as a means to unduly increase punitive damages awards violates due process.[21]

That Oregon provides certain safeguards relating to the jury's consideration of wealth (*i.e.*, first requiring a finding of a *prima facie* case of punitive damages) is not

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[20] The potential for devastating punitive damage awards is exacerbated in product liability cases involving a mass marketed product such as the vehicle involved here. In contrast to *Haslip* and *TXO* where the conduct at issue essentially involved isolated events, the defendant in a products liability case is subject to punitive damage claims from multiple plaintiffs, in multiple jurisdictions, under multiple standards. Accordingly, arguments in support of assessing a manufacturing defendant a "percentage of its wealth" in any single case erroneously assumes that the defendant has unlimited resources to satisfy every potential plaintiff. It also demonstrates that a real danger of wealth evidence is that it will invariably be used by juries to *increase* punitive damages and not as merely one of a host of factors juries should use in arriving at a rationally-based and proportionate award.

[21] We note that the third *Mathews* factor is the governmental interest in avoiding these additional procedures. *Mathews*, 424 U.S. at 321. However, Oregon's decision not to provide post-verdict review was not premised on the burden of additional procedures. *See* Hall S. Lusk, *Forty-Five Years of Article VII, Section 3, Constitution of Oregon*, 35 Or. L. Rev. 1, 1-2 (1955). Moreover, as Petitioners clearly pointed out, Oregon courts already provide excessiveness review in cases arising under federal statutes. (Cert. Pet. at 15). In addition, whatever administrative burdens might be associated with such review do not outweigh the injustice of its omission.

finding of a *prima facie* case of punitive damages) is not sufficient to adequately protect against an outrageously excessive punitive damages award based on prejudice, bias, or other improper motivation. Due process requires, at a minimum, the traditional common-law procedure of post-verdict review.

CONCLUSION

Amicus curiae respectfully requests that the decision of the Oregon Supreme Court be reversed.

Respectfully submitted,

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A. SURVEY OF 1993 DECISIONS REVIEWING JURY PUNITIVE DAMAGES AWARDS

Methodology: Amicus searched the WESTLAW® database for 1993 judicial decisions in which trial or appellate courts reviewed jury punitive damages awards. The search used was "punitive exemplary /3 damages ;30 remittitur reduc! excess! affirm! vacate! & DA (1993)." 964 cases met these search parameters (391 federal; 573 state).

Upon review, 284 of the 964 cases involved actual post-verdict review of a jury punitive damages award. These cases were categorized according to whether the jury punitive damages award was upheld in its entirety, or disturbed in any manner by the reviewing court. A jury punitive damages award was categorized as "disturbed" if any aspect of that award was stricken, remanded or reduced (e.g. remittitur granted), as defined below.

Format: The following tables present the 284 federal and state court decisions reviewing jury punitive damages awards. The federal cases are arranged alphabetically and the state cases are arranged alphabetically by jurisdiction. The tables provide both the jury punitive damages award and the post-verdict review punitive damages award. Abbreviated case citations (providing plaintiff's name, reporter or WESTLAW® citation, and jurisdiction) have been used in the interest of brevity.

Terminology: "Punitive Damages" denotes the punitive damages award assessed by the jury.

"Post-Review Punitive Damages" denotes the amount of the punitive damages award left intact after post-verdict review.

"Unchanged" denotes cases in which the reviewing court did not disturb the jury punitive damages award.

"Stricken" denotes cases in which the jury punitive damages award was set aside in its entirety by the reviewing court.

"Reduced" denotes cases in which the reviewing court diminished the amount of the jury punitive damages award.

"Remanded" denotes cases in which an appellate court directed a lower court to conduct further proceedings relating to the jury punitive damages award, consistent with the principles announced in the opinion. In those cases, the post-review award is denoted as "N/A" for Not Applicable.

"Not Provided" means the decision did not provide dollar amounts for the damages award.

1993 Federal Cases

Case	Jury Punitive Damages	Post-Review Punitive Damages	Result
Abdul-Akbar,4 F.3d 195 (3d Cir.)	$750.00	$0.00	Stricken
Action House Inc.,1993 WL 204807 (S.D.N.Y.)	$362,100.00	$0.00	Stricken
Atwall,1993 WL 525706 (10th Cir.)	$178,000.00	$178,000.00	Unchanged
Beber,1993 WL 118522 (S.D.N.Y.)	$190,000.00	$190,000.00	Unchanged
Bierle,992 F.2d 873 (8th Cir.)	$25,000.00	$0.00	Stricken
Bingham,823 F. Supp. 1126 (S.D.N.Y.)	$1,000,000.00	$250,000.00	Reduced
Blume,985 F.2d 571 (9th Cir.)	$2,000,000.00	$0.00	Stricken
Burke,6 F.3d 497 (8th Cir.)	$50,000,000.00	$0.00	Stricken
Butler,1993 WL 95513 (E.D. Pa.)	$250,000.00	$250,000.00	Unchanged
Capstick,998 F.2d 810 (10th Cir.)	$2,000,000.00	$2,000,000.00	Unchanged
Chandler,996 F.2d 1223 (9th Cir.)	Not Provided	Not Provided	Unchanged
Charleston Area Medical Ctr.,6 F.3d 243 (4th Cir.)	$15,000,000.00	$0.00	Stricken
Compton,1993 WL 141063 (6th Cir.)	$100,000.00	$100,000.00	Unchanged
Darby,827 F. Supp. 1296 (E.D. Mi.)	$250,000.00	$50,000.00	Reduced
Defender Ind. Inc.,989 F.2d 492 (4th Cir.)	$25,000,000.00	$5,000,000.00	Reduced

Survey Overview of Post-Verdict Review of Jury Punitive Damages Awards for Cases Decided in 1993

	No. of Survey Cases	No. / (%) of Survey Cases where Award was Unchanged	No. / (%) of Survey Cases where Award was Stricken	No. / (%) of Survey Cases where Award was Reduced	No. / (%) of Survey Cases where Award was Remanded
State	213	106 (50%)	52 (24%)	28 (13%)	27 (13%)
Federal	71	24 (34%)	30 (42%)	11 (15%)	6 (8%)
Trial	21	7 (33%)	5 (24%)	7 (33%)	2 (10%)
Appellate	263	123 (47%)	77 (29%)	32 (12%)	31 (12%)
Overall	**284**	130 (46%)	**82 (29%)**	**39 (14%)**	**33 (12%)**
		130 (46%)	154 (54%)		

1993 Federal Cases

Case	Jury Punitive Damages	Post-Review Punitive Damages	Result
Kirchoff,997 F.2d 401 (8th Cir.)	Not Provided	N/A	Remanded
Koester,11 F.3d 818 (8th Cir.)	$4,800,000.00	$0.00	Stricken
Lightning Lube,4 F.3d 1153 (3rd Cir.)	$50,000,000.00	$0.00	Stricken
Lynch,985 F.2d 560 (6th Cir.)	$400,000.00	$100,000.00	Reduced
Manildra Milling,1993 WL217173 (Fed. Cir. (Kan.))	$2,250,000.00	$0.00	Stricken
Martin,986 F.2d 242 (8th Cir.)	$500,000.00	$0.00	Stricken
Massey,986 F.2d 1428 (10th Cir.)	$4,000,000.00	$4,000,000.00	Unchanged
MBANK Houston,1 F.3d 1439 (5th Cir.)	$8,000,000.00	$0.00	Stricken
McBee,154 B.R. 82 (W.D. Mo.)	$500,000.00	$500,000.00	Unchanged
Medcom Holding Co.,1993 WL 147450 (N.D. Ill.)	$1,000,000.00	$0.00	Stricken
Merrian-Webster,815 F. Supp. 691 (S.D.N.Y.)	$500,000.00	$500,000.00	Unchanged
Miller,989 F.2d 1450 (6th Cir.)	$650,000.00	$0.00	Stricken
Mojica,7 F.3d 552 (7th Cir.)	$125,000.00	$0.00	Stricken
Moretto,1993 WL 127851 (S.D.N.Y.)	$3,720,979.00	$2,265,420.00	Reduced
Oxford Furniture,984 F.2d 1118 (11th Cir.)	$250,000.00	$0.00	Stricken

1993 Federal Cases

Case	Jury Punitive Damages	Post-Review Punitive Damages	Result
Doe,5 F.3d 347 (8th Cir.)	Not Provided	$10,000.00	Reduced
Dombeck,823 F. Supp. 1475 (W.D. Wi.)	$75,000.00	$0.00	Stricken
Drabik,997 F.2d 496 (8th Cir.)	$7,500,000.00	$0.00	Stricken
Dunn,1 F.3d 1371 (3d Cir.)	$25,000,000.00	$1,000,000.00	Reduced
EEOC,823 F. Supp. 571 (N.D. Ill.)	$500,000.00	$150,000.00	Reduced
Enstar Group,812 F. Supp 1562 (M.D. Ala.)	$18,000,000.00	$10,000,000.00	Reduced
Europlast, Ltd.,10 F.3d 1266 (7th Cir.)	$300,000.00	$0.00	Stricken
Fleet Nat'l Bank,831 F. Supp. 16 (D.R.I.)	$1,000,000.00	N/A	Remanded
Glover,6 F.3d 1318 (9th Cir.)	$1,300,000.00	N/A	Remanded
Guam Asbestos Litig.,1993 WL 470426 (D. Guam App. Div.)	$4,125,000.00	$4,125,000.00	Unchanged
Guaranty Nat'l Ins.,994 F.2d 1280 (7th Cir.)	$1,000,000.00	$0.00	Stricken
Hodson,999 F.2d 540 (6th Cir.)	$500,000.00	$500,000.00	Unchanged
Jeppesen,8 F.3d 1235 (7th Cir.)	$20,000.00	$0.00	Stricken
Kientzy,990 F.2d 1051 (8th Cir.)	$400,000.00	$400,000.00	Unchanged
King,993 F.2d 294 (2d Cir.)	$175,000.00	N/A	Remanded

1993 Federal Cases

Case	Jury Punitive Damages	Post-Review Punitive Damages	Result
Stone,8 F.3d 1079 (6th Cir.)	$5,000,000.00	$0.00	Stricken
Suwannee County Sch. Bd.,837 F. Supp. 1188 (M.D. Fla.)	$30,000.00	$0.00	Stricken
Tioga Sch. Dist., #15,984 F.2d 915 (8th Cir.)	$75,000.00	N/A	Remanded
Toole,999 F.2d 1430 (11th Cir.)	$5,000,000.00	$0.00	Stricken
Trandes Corp.,996 F.2d 655 (4th Cir.)	$750,000.00	N/A	Remanded
Troutt,835 F. Supp. 899 (W.D. Va.)	$50,000.00	$50,000.00	Unchanged
Tudor Assocs.,1993 WL 564720 (E.D.N.C.)	$7,000,000.00	$0.00	Stricken
TXO Prod. Corp.,113 S. Ct. 2711	$10,000,000.00	$10,000,000.00	Unchanged
U.S. Equal. Emp. Opp. Comm'n,1993 WL 427454 (N.D. Ill.)	$500,000.00	$150,000.00	Reduced
Vance,983 F.2d 1573 (11th Cir.)	Not Provided	Not Provided	Unchanged
Winant,5 F.3d 767 (4th Cir.)	$1,000,000.00	$1,000,000.00	Unchanged

1993 Federal Cases

Case	Jury Punitive Damages	Post-Review Punitive Damages	Result
Pacific Group,1993 WL 540942 (N.D. Cal.)	$21,000,000.00	$0.00	Stricken
People Helpers,1993 WL 532121 (4th Cir.)	$1.00	$0.00	Stricken
Perry,10 F.3d 806 (4th Cir.)	$10,000.00	$10,000.00	Unchanged
Piesco,12 F.3d 332 (2d Cir.)	$100,000.00	$100,000.00	Unchanged
Presidio Exploration,986 F.2d 1428 (10th Cir.)	$70,000.00	$70,000.00	Unchanged
Purgess,1993 WL 328919 (S.D.N.Y.)	$4,600,000.00	$500,000.00	Reduced
Robertson Oil,1993 WL 532709 (8th Cir.)	$8,000,000.00	$8,000,000.00	Unchanged
Rodick,1 F.3d. 1341 (2d Cir.)	$120,000.00	$120,000.00	Unchanged
Rose,1993 WL 141081 (10th Cir.)	$45,000.00	$45,000.00	Unchanged
Sherrin,2 F.3d 3737 (11th Cir.)	$150,000.00	$0.00	Stricken
Sogg,193 A.D.2d 153 (N.Y.)	$305,000.00	$0.00	Stricken
St. Laurent,991 F.2d 672 (11th Cir.)	$50,000.00	$50,000.00	Unchanged
Stafford,835 F. Supp. 1136 (W.D. Mo.)	$2.00	$2.00	Unchanged
Standley,5 F.3d 319 (8th Cir.)	$20,000.00	$0.00	Stricken
Stevenson,987 F.2d 288 (5th Cir.)	$100,000.00	$0.00	Stricken

1993 State Cases

Case	Jury Punitive Damages	Post-Review Punitive Damages	Result
Security Pac. Hous. Servs.,866 S.W.2d 375 (Ark.)	$12,000.00	$12,000.00	Unchanged
Wheeler Motor Co.,1993 WL 541434 (Ark.)	$10,000.00	$10,000.00	Unchanged
Piper,1993 WL 471120 (Ariz. Ct. App.)	$750,000.00	$0.00	Stricken
Ateeq,19 Cal. Rptr.2d 320 (Ct. App.)	$265,000.00	$265,000.00	Unchanged
Burnaby,20 Cal. Rptr.2d 44 (Ct. App.)	$500,000.00	$500,000.00	Unchanged
Greenwood & Co. Real Estate,18 Cal. Rptr.2d 144 (Ct. App.)	$22,000,000.00	N/A	Remanded
Harris,17 Cal. Rptr.2d 649 (Ct. App.)	$530,000.00	$0.00	Stricken
Harris,23 Cal. Rptr.2d 343 (Ct. App.)	$3,500,000.00	$975,000.00	Reduced
Heacock,26 Cal. Rptr.2d 257 (Ct. App.)	$435,181.81	N/A	Remanded
Herrick,24 Cal. Rptr.2d 203 (Ct. App.)	$150,000.00	$75,000.00	Reduced
Hunio,18 Cal. Rptr.2d 253 (Ct. App.)	$1,000,000.00	$1,000,000.00	Unchanged
Kenly,19 Cal. Rptr.2d 771 (Ct. App.)	$200,000.00	N/A	Remanded
McLaughlin,26 Cal. Rptr.2d 520 (Ct. App.)	$43,000,000.00	$0.00	Stricken
Myers Building,17 Cal. Rptr.2d 242 (Ct. App.)	$1,100,000.00	$0.00	Stricken
Nola M,20 Cal. Rptr.2d 97 (Ct. App.)	$988,888.00	$0.00	Stricken

1993 State Cases

Case	Jury Punitive Damages	Post-Review Punitive Damages	Result
Cabnetware, Inc.,614 So.2d 1034 (Ala.)	$100,000.00	N/A	Remanded
Cameron,864 P.2d 538 (Alaska)	$161,000.00	$161,000.00	Unchanged
City of Birmingham,1993 WL 527291 (Ala.)	$1,600,000.00	$1,600,000.00	Unchanged
Cottingham,1993 WL 341132 (Ala.)	$1,000,000.00	$600,000.00	Reduced
Grimes,628 So.2d 467 (Ala.)	$3,000,000.00	$0.00	Stricken
Henderson,627 So.2d 878 (Ala.)	$500,000.00	$500,000.00	Unchanged
Independent Fire Ins.,621 So.2d 977 (Ala.)	$100,000.00	$0.00	Stricken
Lozier Corp.,624 So.2d 1034 (Ala.)	$100,000.00	$100,000.00	Unchanged
Phillips Colleges,622 So.2d 308 (Ala.)	$35,000.00	$35,000.00	Unchanged
Reserve Nat'l Ins.,614 So.2d 1005 (Ala.)	$1,000,000.00	$600,000.00	Reduced
Sears Roebuck,1993 WL 341147 (Ala.)	$6,500,000.00	$5,000,000.00	Reduced
BMW of North America,1993 WL 462033 (Ala.)	$4,000,000.00	$2,000,000.00	Reduced
Northwestern Mut. Life,1993 WL 453023 (Ala.)	$24,927,248.00	$12,463,624.00	Reduced
Cater,846 S.W.2d 173 (Ark.)	$350,000.00	$350,000.00	Unchanged
Dillard Dep't Stores,1993 WL 540051 (Ark.)	$100,000.00	N/A	Remanded

1993 State Cases

Case	Jury Punitive Damages	Post-Review Punitive Damages	Result
Gary,430 S.E.2d 182 (Ga. Ct. App.)	$3,561.76	$3,561.76	Unchanged
Hill,437 S.E.2d 801 (Ga. Ct. App.)	$25,000.00	$25,000.00	Unchanged
ICI Americas, Inc.,1993 WL 590461 (Ga. Ct. App.)	$1,000,000.00	$1,000,000.00	Unchanged
Mack Trucks,436 S.E.2d 635 (Ga.)	$2,000,000.00	$2,000,000.00	Unchanged
Macon Tel. Publishing,436 S.E.2d 655 (Ga.)	$70,000.00	$0.00	Stricken
Macon Tel.,430 S.E.2d 18 (Ga. Ct. App.)	$70,000.00	$70,000.00	Unchanged
Oglethorpe Power,436 S.E.2d 14 (Ga. Ct. App.)	$100,000.00	$100,000.00	Unchanged
Roberts,453 S.E.2d 227 (Ga. Ct. App.)	$10,000.00	N/A	Remanded
Stone Man,435 S.E.2d 205 (Ga.)	Not Provided	$0.00	Stricken
Hockenberg Equip.,1993 WL 533870 (Iowa)	$5,000.00	$5,000.00	Unchanged
Curtis,850 P.2d 749 (Ind. Ct. App.)	$725,000.00	N/A	Remanded
Borcherding,624 N.E.2d 887 (Ill. App. Ct.)	$13,300.00	$13,300.00	Unchanged
Bryant,619 N.E.2d 550 (Ill. App. Ct.)	$115,000.00	$115,000.00	Unchanged
Cox,613 N.E.2d 1306 (Ill. App. Ct.)	$1,000,000.00	$1,000,000.00	Unchanged
Girsberger,1993 WL 533825 (Ill. App. Ct.)	$576,000.00	$339,028.00	Reduced

1993 State Cases

Case	Jury Punitive Damages	Post-Review Punitive Damages	Result
Tavaglione,847 P.2d 574 (Cal.)	$2,300,000.00	N/A	Remanded
Eads,1993 WL 539953 (Colo. Ct. App.)	$5,000.00	$5,000.00	Unchanged
Graphic Directions,862 P.2d 1020 (Colo. Ct. App.)	$35,000.00	$1,058.80	Reduced
Keohane,859 P.2d 291 (Colo. Ct. App.)	$8,500.00	$2,500.00	Reduced
Schnabel,630 A.2d 1361 (Conn. App. Ct.)	$150,000.00	$150,000.00	Unchanged
Tessmann,634 A.2d 870 (Conn.)	$30,000.00	$30,000.00	Unchanged
Arthur Young & Co.,631 A.2d 354 (D.C.)	$75,000.00	$75,000.00	Unchanged
Calbert,1993 WL 478079 (Del.)	$250,000.00	$0.00	Stricken
Carroll Air Systems, Inc.,1993 WL 492538 (Fla. Dist. Ct. App.)	$80,000.00	$80,000.00	Unchanged
Crown Eurocars,1993 WL 540177 (Fla. Dist. Ct. App.)	$200,000.00	$0.00	Stricken
Grove,614 So.2d 22 (Fla. Dist. Ct. App.)	$1,000,000.00	$0.00	Stricken
Hardick,618 So.2d 794 (Fla. Dist. Ct. App.)	Not Provided	$0.00	Stricken
Nordyne,625 So.2d 1283 (Fla. Dist. Ct. App.)	Not Provided	N/A	Remanded
Clarke,429 S.E.2d 291 (Ga. Ct. App.)	Not Provided	Not Provided	Unchanged
Combustion Chems.,433 S.E.2d 60 (Ga. Ct. App.)	$100,000.00	$0.00	Stricken

1993 State Cases

Case	Jury Punitive Damages	Post-Review Punitive Damages	Result
Hill,628 So.2d 81 (La. Ct. App.)	$3,000.00	$3,000.00	Unchanged
Jordan,621 So.2d 1141 (La. Ct. App.)	$1,000,000.00	$500,000.00	Reduced
Razorback Oil Tools,626 So.2d 28 (La. Ct. App.)	$4,500,000.00	N/A	Remanded
Caldor,625 A.2d 959 (Md. Ct. Spec. App.)	$357,500.00	N/A	Remanded
Fairfax Sav.,619 A.2d 141 (Md. Ct. Spec. App.)	$6,000,000.00	N/A	Remanded
DiPietro,628 A.2d 1019 (Me.)	$30,000.00	$20,000.00	Reduced
Haworth,623 A.2d 150 (Me.)	$10,000.00	$10,000.00	Unchanged
Laliberte,628 A.2d 1050 (Me.)	$100,000.00	N/A	Remanded
Staples,629 A.2d 601 (Me.)	Not Provided	$0.00	Stricken
Fellows,506 N.W.2d 534 (Mich. Ct. App.)	$500,000.00	$30,000.00	Stricken
Charles R. Rosenbloom,501 N.W.2d 597	$71,000.00	$30,000.00	Reduced
Independent Sch. Dist. No. 622,495 N.W.2d 244 (Minn. Ct. App.)	$2,462,250.00	$1,231,125.00	Reduced
Carpenter,853 S.W.2d 346 (Mo. Ct. App.)	$17,000.00	$17,000.00	Unchanged
Green,851 S.W.2d 553 (Mo. Ct. App.)	$25,000.00	$25,000.00	Unchanged
Miller,1993 WL 360960 (Mo. Ct. App.)	$140,000.00	$140,000.00	Unchanged

1993 State Cases

Case	Jury Punitive Damages	Post-Review Punitive Damages	Result
Jerry Clark Equip.,612 N.E.2d 858 (Ill. App. Ct.)	$18,000.00	$18,000.00	Unchanged
Johnston,621 N.E.2d 137 (Ill. App. Ct.)	$50,000.00	$0.00	Stricken
Kennan,620 N.E.2d 1208 (Ill. App. Ct.)	$193,000.00	$0.00	Stricken
Kochan,610 N.E.2d 683 (Ill. App. Ct.)	$5,000,000.00	$5,000,000.00	Unchanged
McKernan,623 N.E.2d 981 (Ill. App. Ct.)	$420,000.00	$420,000.00	Unchanged
Shirk,617 N.E.2d 152 (Ill. App. Ct.)	$150,000.00	$0.00	Stricken
Erie Ins.,610 N.E.2d 283 (Ind. Ct. App.)	Not Provided	$0.00	Stricken
Erie Ins.,622 N.E.2d 515 (Ind.)	$11,000.00	$0.00	Stricken
Miller Brewing,608 N.E.2d 975 (Ind.)	$1,989,260.00	$0.00	Stricken
Star Bank, N.A.,626 N.E.2d 466 (Ind. Ct. App.)	$7,000.00	$7,000.00	Unchanged
Beeman,496 N.W.2d 247 (Iowa)	$5,000,000.00	$0.00	Stricken
Burrowwood Assocs.,853 P.2d 1175 (Kan. Ct. App.)	$65,000.00	$65,000.00	Unchanged
Gillespie,853 P.2d 692 (Kan.)	$4,114,250.00	N/A	Remanded
Smith,1993 WL 540020 (Kan.)	$120,000.00	N/A	Remanded
Hanson,865 S.W.2d 302 (Ky.)	$5,775,000.00	$5,775,000.00	Unchanged

1993 State Cases

Case	Jury Punitive Damages	Post-Review Punitive Damages	Result
Jeffries,828 F. Supp 1066 (S.D.N.Y.)	$400,000.00	$360,000.00	Reduced
Kelleher,596 N.Y.S.2d 136 (App. Div.)	$1,000,000.00	$250,000.00	Reduced
Licette Music Corp.,601 N.Y.S.2d 297 (App. Div.)	$750,000.00	$750,000.00	Unchanged
Papa,598 N.Y.S.2d 558 (App. Div.)	$2,500,000.00	$1,000,000.00	Reduced
Prozeralik,593 N.Y.S.2d 662 (App. Div.)	$10,000,000.00	$10,000,000.00	Unchanged
Prozeralik,626 N.E.2D 34 (N.Y.)	$10,000,000.00	N/A	Remanded
Warner,598 N.Y.S.2d 863 (App. Div.)	$5,000.00	$0.00	Stricken
Williams,602 N.Y.S.2d 199 (App. Div.)	$12,792.00	$0.00	Stricken
Wolfisch,601 N.Y.S.2d 300 (App. Div.)	$5,000.00	$0.00	Stricken
Arthur Young & Co.,623 N.E.2d 1303 (Ohio Ct. App.)	$600.00	$600.00	Unchanged
Cabe,1993 WL 419086 (Ohio Ct. App.)	$250,000.00	$0.00	Stricken
Calmes,1993 WL 455253 (Ohio Ct. App.)	$1,000,000.00	$0.00	Reduced
Crothers,1993 WL 405449 (Ohio Ct. App.)	$5,000.00	$5,000.00	Unchanged
Edwards,1993 WL 413602 (Ohio Ct. App.)	Not provided	$0.00	Unchanged
Herald,1993 WL 277541 (Ohio Ct. App.)	$5,000,000.00	$2,500,000.00	Reduced

1993 State Cases

Case	Jury Punitive Damages	Post-Review Punitive Damages	Result
Ross,1993 WL 402914 (Mo. Ct. App.)	$1,000,000.00	$0.00	Stricken
Self,854 S.W.2d 571 (Mo. Ct. App.)	Not Provided	$0.00	Stricken
Strothkamp,1993 WL 79239 (Mo. Ct. App.)	$20,000,000.00	N/A	Remanded
ACI Chems.,615 So.2d 1192 (Miss.)	Not Provided	$0.00	Unchanged
Kendal,1993 WL 522804 (Miss.)	$500.00	$500.00	Unchanged
Polk,613 So.2d 841 (Miss.)	$50,000.00	$50,000.00	Unchanged
Dees,861 P.2d 141 (Mont.)	$575,000.00	$300,000.00	Reduced
Lovell,424 S.E.2d 181 (N.C. Ct. App.)	$225,000.00	$225,000.00	Unchanged
Martinez,424 S.E.2d 154 (N.C. Ct. App.)	$30,000.00	$30,000.00	Unchanged
United Labs.,437 S.E.2d 374 (N.C.)	$100,000.00	$100,000.00	Unchanged
Fisher,508 N.W.2d 352 (N.D.)	$30,000.00	$30,000.00	Unchanged
Abbamont,634 A.2d 538 (N.J.)	$60,000.00	N/A	Remanded
Herman,627 A.2d 1081 (N.J.)	$400,000.00	$400,000.00	Unchanged
Wachstein,625 A.2d 527 (N.J. Super. Ct. App. Div.)	$16.00	$16.00	Unchanged
Ward,623 A.2d 285 (N.J. Super. Ct. App. Div.)	$50,000.00	$50,000.00	Unchanged

1993 State Cases

Case	Jury Punitive Damages	Post-Review Punitive Damages	Result
Host,1993 WL 266901 (Ohio Ct. App.)	$50,000.00	$0.00	Stricken
James,1993 WL 208351 (Ohio Ct. App.)	$120,000.00	$120,000.00	Unchanged
Johnson,1993 WL 323380 (Ohio Ct. App.)	$10,000.00	$0.00	Stricken
Lannigan,1993 WL 310380 (Ohio Ct. App.)	$100,000.00	$100,000.00	Unchanged
Mitterholzer,1993 WL 215381 (Ohio Ct. App.)	$25,000.00	$0.00	Stricken
Moskovitz,1993 WL 4549 (Ohio Ct. App.)	$3,000,000.00	$0.00	Stricken
Shellhorn,1993 WL 264613 (Ohio Ct. App.)	$1,000.00	$0.00	Stricken
Turner,1993 WL 485256 (Ohio Ct. App.)	$120,000.00	$120,000.00	Unchanged
Calvert,856 P.2d 1011 (Okla. Ct. App.)	$30,000.00	$30,000.00	Unchanged
Nally,1993 WL 562078 (Okla. Ct. App.)	$50,000.00	$50,000.00	Unchanged
Nelson,864 P.2d 1279 (Okla.)	$150,000.00	$5,504.00	Reduced
Rodebush,1993 WL 14683 (Okla.)	$1,200,000.00	$1,200,000.00	Unchanged
Wallace,850 P.2d 1056 (Okla.)	$42,000.00	$42,000.00	Unchanged
Eulrich,853 P.2d 1350 (Or.)	$8,912.00	N/A	Remanded
Huffman and Wright Logging,857 P.2d 101 (Or.)	$25,000.00	$25,000.00	Unchanged

1993 State Cases

Case	Jury Punitive Damages	Post-Review Punitive Damages	Result
Lovejoy Specialty,855 P.2d 159 (Or. Ct. App.)	$700,000.00	$700,000.00	Unchanged
Nelson,862 P.2d 1293 (Or.)	Not provided	N/A	Remanded
Orberg,851 P.2d 1084 (Or.)	$5,000,000.00	$5,000,000.00	Unchanged
Raichl,852 P.2d 214 (Or. Ct. App.)	Not provided	N/A	Remanded
Rogue Fed. Credit,855 P.2d 1146 (Or. Ct. App.)	$1,500.00	$0.00	Stricken
Feldmam,1993 WL 404094 (E.D. Pa.)	$20,000.00	$20,000.00	Unchanged
Trainor,625 A.2d 1349 (R.I.)	$250,000.00	$0.00	Stricken
Camlin,428 S.E.2d 6 (S.C. Ct. App.)	$100,000.00	$100,000.00	Unchanged
Dowling,428 S.E.2d 709 (S.C.)	Not provided	$0.00	Stricken
Foggie,431 S.E.2d 587 (S.C.)	$75,000.00	$0.00	Stricken
Hansel,437 S.E.2d 159 (S.C. Ct. App.)	Not provided	$0.00	Unchanged
Harold Tyner Dev. Builders,429 S.E.2d 819 (S.C. Ct. App.)	$150,000.00	$150,000.00	Unchanged
Kinard,433 S.E.2d 835 (S.C.)	$444,215.50	$444,215.50	Unchanged
Weir,435 S.E.2d 864 (S.C.)	$500,000.00	$275,000.00	Reduced
Brandriet,499 N.W.2d 613 (S.D.)	$200,000.00	$200,000.00	Unchanged

1993 State Cases

Case	Jury Punitive Damages	Post-Review Punitive Damages	Result
Fidelity & Guaranty Ins.,865 S.W.2d 103 (Tex. Ct. App.)	$4,250,000.00	$250,000.00	Reduced
General Chem. Corp.,852 S.W.2d 916 (Tex.)	$30,000,000.00	$8,000,000.00	Reduced
General Mills Restaurants,865 S.W.2d 48 (Tex. Ct. App.)	$50,000.00	$50,000.00	Unchanged
General Motors Corp.,1993 WL 483479 (Tex.)	$2,500,000.00	$0.00	Stricken
Gonzalez,1993 WL 265454 (Tex. Ct. App.)	$10,000.00	$10,000.00	Unchanged
Greater Houston Transp.,850 S.W.2d 579 (Tex. Ct. App.)	$500,000.00	$500,000.00	Unchanged
Greer,1993 WL 444320 (Tex. Ct. App.)	$50,000.00	$0.00	Stricken
Haryanto,860 S.W.2d 913 (Tex. Ct. App.)	$2,000,000.00	$2,000,000.00	Unchanged
Haynes & Boone,864 S.W.2d 662 (Tex. Ct. App.)	$1,500,000.00	$1,500,000.00	Unchanged
Heil-Quaker,863 S.W.2d 210 (Tex. Ct. App.)	$2,500,000.00	$1,000,000.00	Reduced
Jochec,863 S.W.2d 516 (Tex. Ct. App.)	$700,000.00	N/A	Remanded
Keene Corp.,1993 WL 522584 (Tex. Ct. App.)	$2,000,000.00	$2,000,000.00	Unchanged
McLendon,862 S.W.2d 662 (Tex. Ct. App.)	$100,000.00	$100,000.00	Unchanged
Missouri Pac. R.R.,861 S.W.2d 501 (Tex. Ct. App.)	$10,000,000.00	$8,872,073.12	Reduced
Motsenbocker,863 S.W.2d 126 (Tex. Ct. App.)	$420,000.00	$420,000.00	Unchanged

1993 State Cases

Case	Jury Punitive Damages	Post-Review Punitive Damages	Result
Blackburn,1993 WL 17140 (Tenn. Ct. App.)	$50,000.00	N/A	Remanded
Davis,1993 WL 104630 (Tenn. Ct. App.)	$2,000.00	N/A	Remanded
Acme Boot Co.,862 S.W.2d 806 (Tex. Ct. App.)	$100,000.00	$100,000.00	Unchanged
Am. Rec. Mkts.,846 S.W.2d 476 (Tex. Ct. App.)	$50,000.00	N/A	Remanded
Berry Property,850 S.W.2d 644 (Tex. Ct. App.)	$5,000,000.00	$5,000,000.00	Unchanged
Borden, Inc.,850 S.W.2d 821 (Tex. Ct. App.)	$3,118,000.00	$3,118,000.00	Unchanged
Borden, Inc.,860 S.W.2d 515 (Tex. Ct. App.)	$1,750,000.00	$1,750,000.00	Unchanged
Box,1993 WL 561642 (Tex. Ct. App.)	$5,000.00	$5,000.00	Unchanged
Boyles,855 S.W.2d 593 (Tex.)	$500,000.00	N/A	Remanded
City of La Porte,851 S.W.2d 876 (Tex. Ct. App.)	$1,000,000.00	$1,000,000.00	Unchanged
Davis,865 S.W.2d 231 (Tex. Ct. App.)	$100,000.00	$100,000.00	Unchanged
Ellis County St. Bank,1993 WL 558938 (Tex. Ct. App.)	$1,535,000.00	$1,535,000.00	Unchanged
Employers Nat'l Ins. Co.,1993 WL 92762 (Tex. Ct. App.)	$250,000.00	$0.00	Stricken
Federal Deposit Ins.,859 S.W.2d 635 (Tex. Ct. App.)	$100.00	$0.00	Stricken
Federal Express Corp.,846 S.W.2d 282 (Tex.)	$50,000.00	$0.00	Stricken

1993 State Cases

Case	Jury Punitive Damages	Post-Review Punitive Damages	Result
United States Sporting Prods.,865 S.W.2d 214 (Tex. Ct. App.)	$482,125.00	$482,125.00	Unchanged
Wal-Mart Stores,1993 WL 502513 (Tex. Ct. App.)	$400,000.00	$0.00	Stricken
Alta Indus.,846 P.2d 1282 (Utah)	$100,000.00	$0.00	Stricken
Crookston,860 P.2d 937 (Utah)	$4,000,000.00	$4,000,000.00	Unchanged
Lake Philgas Serv.,845 P.2d 951 (Utah Ct. App.)	$25,000.00	$25,000.00	Unchanged
ONG Int'l.,850 P.2d 447 (Utah)	$1,800,000.00	$1,800,000.00	Unchanged
Ingles,435 S.E.2d 641 (Va.)	$100,000.00	N/A	Remanded
Marina Shores, Ltd.,435 S.E.2d 136 (Va.)	$480,000.00	$0.00	Stricken
Carmichael,1993 WL 557150 (Vt.)	$100,000.00	$100,000.00	Unchanged
Loula,498 N.W.2d 866 (Wis. Ct. App.)	$56,000.00	$0.00	Stricken
Marsh,505 N.W.2d 162 (Wis. Ct. App.)	$550,000.00	$0.00	Stricken
Moriarty,506 N.W.2d 170 (Wis. Ct. App.)	$10,000.00	$10,000.00	Unchanged
Nash,499 N.W.2d 301 (Wis. Ct. App.)	$15,000.00	$15,000.00	Unchanged
Vanderwal,508 N.W.2d 74 (Wis. Ct. App.)	$45,000.00	$45,000.00	Unchanged
Wood,502 N.W.2d 617 (Wis. Ct. App.)	$7,000.00	$7,000.00	Unchanged

1993 State Cases

Case	Jury Punitive Damages	Post-Review Punitive Damages	Result
National Convenience Stores,1993 WL 153756 (Tex. Ct. App.)	$1,000,000.00	$1,000,000.00	Unchanged
Nationwide Mut. Ins.,857 S.W.2d 644 (Tex. Ct. App.)	$1,000,000.00	$1,000,000.00	Unchanged
Newman,866 S.W.2d 721 (Tex. Ct. App.)	$150,000.00	$150,000.00	Unchanged
Nicolau,1993 WL 521051 (Tex. Ct. App.)	$300,000.00	$300,000.00	Unchanged
Phar-Mor,853 S.W.2d 710 (Tex. Ct. App.)	$50,000.00	$0.00	Stricken
Prentice Properties Ltd.,1993 WL 189624 (Tex. Ct. App.)	$900,000.00	$0.00	Stricken
Qualicare of East Texas,863 S.W.2d 220 (Tex. Ct. App.)	$50,000.00	$50,000.00	Unchanged
Ralston Purina,850 S.W.2d 629 (Tex. Ct. App.)	$185,000.00	$60,000.00	Reduced
Rhodes,848 S.W.2d 833 (Tex. Ct. App.)	$125,000.00	$125,000.00	Unchanged
Rodiguez,856 S.W.2d 552 (Tex. Ct. App.)	Not Provided	N/A	Reduced
Sanchez,860 S.W.2d 503 (Tex. Ct. App.)	$75,000.00	$75,000.00	Unchanged
Shelton Ins. Agency,848 S.W.2d 739 (Tex. Ct. App.)	$500,000.00	$0.00	Stricken
State Farm Fire & Casualty,857 S.W.2d 126 (Tex. Ct. App.)	$2,000,000.00	$2,000,000.00	Unchanged
Swartwood,1993 WL 265128 (Tex. Ct. App.)	$27,000.00	$27,000.00	Unchanged
Texas Dept' of Human Servs.,855 S.W.2d 136 (Tex. Ct. App.)	$10,000,000.00	$10,000,000.00	Unchanged

Case	Jury Punitive Damages	Post-Review Punitive Damages	Result
Horan, 433 S.E.2d 559 (W. Va.)	$40,000.00	$40,000.00	Unchanged
LaPlaca, 428 S.E.2d 322 (W. Va.)	$25,000.00	$0.00	Stricken
Wilt, 1993 WL 517042 (W. Va.)	$1,000,000.00	$1,000,000.00	Unchanged

B. AMERICAN JURISDICTIONS ON SUBMITTING WEALTH EVIDENCE TO JURIES IN ASSESSING PUNITIVE DAMAGES

PROHIBIT [5]

AL Industrial Chem. & Fiberglass Corp. v. Chandler, 547 So.2d 812, 835 (Ala. 1988).

KY Hensley v. Paul Miller Ford, 508 S.W.2d 759, 764 (Ky. Ct. App. 1974).

MI Peisner v. Detroit Free Press, 242 N.W.2d 775, 780 (Mich. Ct. App. 1976), *aff'd as modified by* 364 N.W.2d 600 (Mich. 1984).

NE Singles v. Union Pac. R.R. Co., 119 N.W.2d 680, 684 (Neb. 1963).

FL Barr v. Interbay Citizens Bank of Tampa, Fla., 635 P.2d 441, 444 (Wa. 1981) (en banc) (prohibits punitive damages on public policy grounds).

PERMIT WITHOUT SAFEGUARDS [18]

AK Pletnikoff v. Johnson, 765 P.2d 973, 979 (Alaska 1988).

CT Lenz v. CNA Assurance Co., 630 A.2d 1082, 1083 (Conn. Super. Ct. 1993); but see Conn. Gen. Stat. Ann. § 52-240b (West 1993) (court determines amount of award).

GUAM In re Guam Asbestos Litigation (Brennan v. Owens-Corning Fiberglass Corp.), No. 92-00064A, 1993 WL 470426 (D. Guam App. Div. Oct. 19, 1993) at (wealth evidence required for a punitive damage award).

HI Beerman v. Toro Mfg. Corp., 615 P.2d 749, 755 (Haw. Ct. App. 1980).

IL Walker v. Dominick's Finer Foods, Inc., 415 N.E.2d 1213, 1217 (Ill. App. Ct. 1981).

IN Ramada Hotel Operating Co. v. Schaffer, 576 N.E.2d 1264, 1268 (Ind. Ct. App. 1991).

LA *Jordan v. Intercontinental Bultank Corp.*, 621 So.2d 1141, 1157 (La. Ct. App.), *cert. denied*, 623 So.2d 1335 (La.), *cert. denied*, 623 So.2d 1336 (La.), *reconsideration denied*, 625 So.2d 1026 (La. 1993), *cert. denied*, -- U.S. --, NO. 93-929, 1993 WL 531465 (Jan. 24, 1994).
ME *Caron v. Caron*, 577 A.2d 1178, 1180 (Me. 1990).
NH *Belknap v. R.R.*, 49 N.H. 358, 374 (1870).
NM *Aragon v. Gen. Elec. Credit Corp.*, 557 P.2d 572, 575 (N.M. Ct. App.), *cert. denied*, 558 P.2d 619 (N.M. 1976).
NC *Juarez-Martinez v. Deans*, 424 S.E.2d 154 (N.C. Ct. App.), *review denied*, 429 S.E.2d 558 (N.C. 1993).
OK *Wood Petroleum Corp. v. Delhi Gas Pipeline Corp.*, 700 P.2d 1023, 1028 (Okla. Ct. App. 1983).
P.R. *Cuello-Suarez v. Autoridad De Energia Electrica De Puerto Rico*, 737 F. Supp. 1243, 1255, 1255 n.24 (D.P.R. 1990).
SC *Hicks v. Herring*, 144 S.E.2d 151, 154 (S.C. 1965).
VT *Parker v. Hoefer*, 100 A.2d 434, 446-47 (Vt. 1953).
V.I. *Herman v. Hess Oil Virgin Islands Corp.*, 524 F.2d 767, 772 (3rd Cir. 1975).
VA *Weatherford v. Birchett*, 164 S.E. 535, 537 (Va. Ct. App. 1932).
WV *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870, 887 (W. Va. 1992), *aff'd*, 113 S. Ct. 2711 (1993).
WI *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 447 (Wis. 1980).

PERMIT AFTER PLAINTIFF OFFERS EVIDENCE THAT JUSTIFIES IMPOSING PUNITIVE DAMAGES [5]

AR *Holmes v. Hollingsworth*, 352 S.W.2d 96, 99-100 (Ark. 1961).
DE *Bryan v. Thos. Best & Sons, Inc.*, 453 A.2d 107, 108 (Del. Super. Ct. 1982).
IA *Hoekstra v. Farm Bureau Mut. Ins. Co.*, 382 N.W.2d 100, 109-110 (Iowa 1986).

MD *Hamilton v. Ford Motor Credit Co.*, 502 A.2d 1057, 1067 (Md. Ct. Spec. App.), *cert. denied*, 507 A.2d 631 (Md. 1986).
SD *Smith v. Weber*, 16 N.W.2d 537, 540 (S.D. 1944).

PERMIT AFTER PLAINTIFF PROVES A PRIMA FACIE CASE FOR IMPOSING PUNITIVE DAMAGES [8]

AZ *Ball v. Prentice*, 781 P.2d 628, 630-31 (Ariz. Ct. App. 1989).
CO *Leidholt v. District Court*, 619 P.2d 768, 771 (Colo. 1980).
DC *Robinson v. Sarisky*, 535 A.2d 901, 907 (D.C. 1988).
FL *Rinaldi v. Aaron*, 314 So.2d 762, 763-64 (Fla. 1975) (prove liability for punitive damages).
MS *Mutual Life Ins. Co. of N.Y. v. Estate of Wesson*, 517 So.2d 521, 532 (Miss. 1987)(prove liability for punitive damages) *cert. denied*, 486 U.S. 1043 (1988)
PA *Feld v. Merriam*, 461 A.2d 225, 237 (Pa. Super. Ct. 1983), *rev'd on other grounds*, 485 A.2d 742 (Pa. 1984).
RI *Palmisano v. Toth*, 624 A.2d 314, 320 (R.I. 1993).
OR Or. Rev. Stat. § 41.315(2) (1991).

BIFURCATED PROCEDURE [1] [14]

CA Cal. Civ. Code § 3295(d) (West 1994)
GA Ga. Code. Ann. § 51-12-5.1(d) (1993)
KS Kan. Stat. Ann. § 60-3701 (1992)
MO Mo. Ann. Stat. § 510.263 (Vernon 1993)
MT Mont. Code Ann. § 27-1-221 (1993)
NV Nev. Rev. Stat. § 42.005 (1993)
OH Ohio Rev. Code Ann. § 2315.21 (1992) (court determines amount of award)

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1. In the first stage, the jury determines whether petitioner is entitled to punitive damages. If the jury determines that plaintiff is entitled to punitive damages, then in the second stage, the jury hears wealth evidence in determining the amount of the award.

UT Utah Code Ann. § 78-18-1 (1993)
MN Minn. Stat. Ann. § 549.20 (West 1994) (bifurcates the entire punitive damage issue) [2]
ID *Spence v. Howell*, Nos. 19708, 19779, 1994 WL 6807, at *6 (Idaho Ct. App. Jan. 13, 1994).
NY *Rozwell v. Philanz Oldsmobile, Inc.* 591 N.Y.S.2d 649, 650 (App. Div. 1992).
TN *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn.), *reh'g denied*, No. 12, 1992 WL 136471 (Tenn. May 26, 1992).
TX *Transportation Ins. Co. v. Moriel*, D-1507, 1994 Tex. LEXIS 23, at *63.
WY *Campen v. Stone*, 635 P.2d 1121, 1132 (Wyo. 1981).

OTHER [3]

ND North Dakota, by statute enacted in 1987, prohibits wealth evidence in determining punitive damages. N.D. Cent. Code § 32-03.2-11 (1993); ***But see Stoner v. Nash Finch Inc.***, 446 N.W.2d 747, 754 (N.D. 1989) (jury may consider evidence of defendant's wealth when determining the amount of punitive damages).
MA Massachusettes - Unable to locate any authority indicating whether Massachusetts permits juries to hear wealth evidence in determining punitive damages.
NJ N.J. Stat. Ann. § 2A:58C-5 (West 1993)(trifurcated procedure)

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2. Thus, during the first stage the jury determines only the plaintiff's compensatory damages. Wealth evidence is not admissible at this stage. At the second stage, however, the trier of fact determines both whether plaintiff is entitled to punitive damages and what amount to award.

No. 93-644

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD.; and AMERICAN HONDA MOTOR CO., INC.,
Petitioners,

v.

KARL L. OBERG,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF AMICI CURIAE CBS INC.; CABLE NEWS NETWORK, INC.; CAPITAL CITIES/ABC, INC.; THE CHRONICLE PUBLISHING COMPANY; THE COPLEY PRESS, INC.; DOW JONES & COMPANY, INC.; PROVIDENCE JOURNAL COMPANY; REUTERS AMERICA INC.; TIME INC.; WESTINGHOUSE BROADCASTING COMPANY, INC.; ASSOCIATION OF AMERICAN PUBLISHERS; MAGAZINE PUBLISHERS OF AMERICA, INC.; NATIONAL ASSOCIATION OF BROADCASTERS; NEWSPAPER ASSOCIATION OF AMERICA; RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; AND SOCIETY OF PROFESSIONAL JOURNALISTS, IN SUPPORT OF PETITIONERS

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IN THE

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No. 93-644

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD.; and AMERICAN HONDA MOTOR CO., INC.,
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KARL L. OBERG,
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STATEMENT OF INTEREST

Amici curiae are a cross-action of broadcasters, publishers, and associations representing the news media and journalists,[1] all of whom face the risk of irrational and unrestrained damage awards in the course of performing their vital task of keeping the public informed. Often, it is only the constitutional conscience of judges that stands between these members of the press and potentially crippling damage awards by juries determined to punish the messengers who carry the "vehement, caustic, and sometimes unpleasantly sharp attacks" [2] that often are at the core of public discourse.

Many of these *amici* have addressed the Court in recent cases examining the constitutionality of punitive damages.[3] In those instances, the Court was urged to recognize the particular threat to First Amendment freedoms posed by unrestrained punitive damages in defamation cases, a concern which members of the court have acknowledged.[4] The interest of *amici* in this case is similar, but even more direct. Here, *amici curiae* urge the Court to recognize and reaffirm the constitutional duty of courts at all levels to exercise independent review of any judgment arising from such cases, to assure that the award of damages is not used to punish or deter protected speech.

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[1] Written consent of both parties to the filing of this brief has been filed with the Clerk of the Court as required by Supreme Court Rule 37.

[2] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

[3] *See, e.g.*, Briefs of Amici Curiae in *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988).

[4] *See Pacific Mutual*, 499 U.S. at 38-39 (Scalia, J., concurring); *The Florida Star v. B.J.F.*, 491 U.S. 524, 553 n.5 (1989) (White, J., dissenting, along with Justice O'Connor and the Chief Justice).

SUMMARY OF ARGUMENT

Amici curiae support the Petitioners' argument that judicial review of damages awards is necessary to assure due process of law in all cases and that Oregon Constitution Article VII, Section 3 as interpreted by the state supreme court prevents meaningful review at both the trial and appellate levels. More importantly, in libel actions and other cases implicating First Amendment freedoms, the Oregon rule would preclude courts from exercising their constitutional duty to independently assure "that the judgment does not constitute a forbidden intrusion on the field of free expression." [5]

The duty of independent review in First Amendment cases is a constitutional responsibility of all judges and cannot be delegated to the trier of fact.[6] In libel actions it is not confined to evidence of "actual malice" under the *New York Times* rule, but applies as well to any aspect of the case that may render the judgment impermissible under the First Amendment.[7]

The prospect of unrestrained damages awards in libel cases has long been recognized by the Court as an impermissible threat to First Amendment freedoms. Any award of damages "far in excess of any actual injury" constitutes an intrusion on the First Amendment that cannot be justified by the countervailing state interest in redressing actual injury.[8] It is a judgment that must be subject to independent judicial review.

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[5] *New York Times*, 376 U.S. at 285; *accord Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984).

[6] *Bose*, 466 U.S. at 501.

[7] *See, e.g., Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 13 (1970); *Rosenblatt v. Baer*, 383 U.S. 75 (1966), *New York Times*, 376 U.S. at 288.

[8] *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 329 (1974).

This Court has held that libel awards must be supported by evidence of actual injury.[9] But the experience of *amici curiae* has shown that judicial review of libel awards and sensitive application of such post-trial remedies as remittitur are essential to give meaning to this rule. Where "actual injury" may include such elusive and subjective claims as embarrassment, mental anguish, and damage to reputation, independent review of damages awards is constitutionally required to prevent these awards from becoming "a formidable weapon" for punishing unpopular speech and speakers.[10]

ARGUMENT

I. COURTS HAVE A CONSTITUTIONAL DUTY TO INDEPENDENTLY REVIEW JUDGMENTS THAT THREATEN FIRST AMENDMENT FREEDOMS.

The Petition before the Court challenges the Oregon courts' interpretation of their state constitution as preventing judicial review, at both trial and appellate levels, of the amount of damages awarded by juries. In effect, Oregon courts are denied the power of remittitur. The question presented is whether this interpretation results in a denial of due process, in violation of the Fourteenth Amendment. *Amici* support Petitioners' argument that it does. Regardless of the answer to this general question, however, *amici* urge the Court to recognize that the Oregon rule also prevents independent review of damages awards that punish or threaten free expression, and therefore is inconsistent with the First Amendment.

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court recognized a constitutional duty

> to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. . . . We must "make an independent examination of the whole record," so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

Id. at 284-85 (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)) (citation omitted).

Although this constitutional mandate of independent review is most often addressed to the threshold question of "actual malice" under the rule in *New York Times*,[11] the review cannot be confined to that single issue.[12] In *New York Times* itself, the Court extended its review to examine whether the allegedly libelous statements were made "of and concerning" the plaintiff:

> We also think the evidence was *constitutionally* defective in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made "of and concerning" respondent.

376 U.S. at 288 (emphasis added).

Similarly, in *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970), the Court independently reviewed evidence of the circumstances surrounding publication of a purported charge of blackmail, and held

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[9] *Gertz*, 418 U.S. at 349.

[10] *Gertz*, 418 U.S. at 367 (Brennan, J., dissenting).

[11] *See, e.g., Bose*, 466 U.S. 485.

[12] Indeed, the rule cited by the Court to compel independent review of the evidence in *New York Times* was drawn from a series of First Amendment cases that obviously predated announcement of the "actual malice" rule. *See New York Times*, 376 U.S. at 285: *Edwards v. South Carolina*, 372 U.S. 220, 235 (1963); *Speiser v. Randall*, 357 U.S. 513, 525 (1958); *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946).

"that as a matter of *constitutional* law, the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported in the *Greenbelt News Review*." Id. at 13 (emphasis added).

In *Rosenblatt v. Baer*, 383 U.S. 75 (1966), the Court held that evidence relating to the respondent's status as a public official was reviewable under the same constitutional standard of independent review:

> [I]t is for the trial judge in the first instance to determine whether the proofs show respondent to be a "public official." . . . Such a course will both lessen the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers, and assure an appellate court the record and findings required for review of constitutional decisions.

Id. at 88 and n.15 (citing *Speiser v. Randall*, 357 U.S. 513, 525 (1958); *New York Times*, 376 U.S. at 285).

The lesson of these cases is clear. The constitutional responsibility of independent judicial review is not confined to reviewing a single threshold test such as actual malice. It extends to any aspect of a judgment that, if upheld, would "constitute a forbidden intrusion on the field of free expression," *New York Times*, 376 U.S. at 285, and therefore independent judicial review should encompass the issue of whether damages awarded to a libel plaintiff are permissible compensation for actual injury, or whether they cross the constitutional line to act as forbidden punishment of speech. The Oregon rule abrogates judicial responsibility for this critical determination and delegates to the jury the unreviewable discretion to award damages far in excess of actual injury. This result is unconstitutional in First Amendment cases:

> [T]he rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function

> be performed in the particular case by a jury or by a trial judge.

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 501 (1984).

II. THE AMOUNT OF DAMAGES AWARDED IN FIRST AMENDMENT CASES IS AN ISSUE OF CONSTITUTIONAL DIMENSION SUBJECT TO THE DUTY OF INDEPENDENT JUDICIAL REVIEW.

In refining constitutional limitations on the law of libel in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court recognized that "the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment," *id.* at 325, required a balancing of First Amendment interests against "[t]he legitimate state interest underlying the law of libel [which] is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Id.* at 341. That state interest, the Court stressed, "extends no further than compensation for actual injury."[13] *Id.* at 349.

These central principles define the constitutional line between the legitimate state interest in providing compensation for actual injury and the impermissible award of excessive damages to punish unpopular speech and speakers:

> [T]he doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, *the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.*

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[13] The Court even suggested that in the absence of such a state interest "this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation." *Gertz*, 418 U.S. at 341.

Id. (emphasis added). In other words, an award of damages "far in excess of any actual injury" constitutes an intrusion on the First Amendment that cannot be justified by a countervailing state interest. Under the cases discussed above, it is therefore the constitutional duty of the courts to independently review such damages awards and, where necessary, to redraw that line to restore the proper balance. *See New York Times,* 376 U.S. at 285; *Speiser v. Randall,* 357 U.S. 513, 525 (1958).

Independent review of libel damages awards is at least as critical as review of evidence of actual malice, falsity, identification of the plaintiff ("of and concerning"), or any other constitutional threshold question. In all the Court's efforts to define the constitutional limitations on the law of libel, the underlying theme has been the recognition that the threat of unrestrained damages awards creates an unconstitutional chill on the exercise of First Amendment freedoms. See *New York Times,* 376 U.S. at 277 ("fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute");[14] *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 83 (1971) (Marshall, J., dissenting) ("fear of the extensive awards that may be given under the doctrine must necessarily produce the impingement on freedom of the press recognized in *New York Times*");[15] *Gertz,* 418

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[14] The Court also stated in *New York Times*:

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable "self-censorship." . . . The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

376 U.S. at 279.

[15] Justice Marshall further explained:

> The effect is to give the jury essentially unlimited discretion and thus to give it much the same power it exercises under

U.S. at 349 ("[t]he largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential . . . to inhibit the vigorous exercise of First Amendment freedoms"); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 772 (1985) (White, J., concurring) ("the *New York Times* standard was formulated to protect the press from the chilling danger of numerous large damages awards").

Justice White, writing separately in both *Gertz* and *Dun & Bradstreet,* expressed the opinion that controlling the amount of libel damages might be at least as effective a constitutional limitation as application of the *New York Times* rule. In his dissenting opinion in *Gertz,* he disagreed with the majority's approach and argued that protection against uncontrolled damages awards could be left to "the role of trial and appellate courts in limiting excessive jury verdicts where no reasonable relationship exists between the amount awarded and the injury sustained." 418 U.S. at 394. He supported this argument with an extensive footnote discussing the use of appellate review and remittitur as an effective means of exercising the necessary control. *Id.* at 394 n.31.

In *Dun & Bradstreet,* Justice White was more explicit:

> In *New York Times,* . . . we could have achieved our stated goal by limiting the recoverable damages to a level that would not unduly threaten the press. Punitive damages might have been scrutinized as

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> the labels of punitive or exemplary damages. The impingement upon free speech is the same no matter what label is attached.
>
> The unlimited discretion exercised by juries in awarding punitive and presumed damages compounds the problem of self-censorship that necessarily results from the awarding of huge judgments. This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others. Such free wheeling discretion presents obvious and basic threats to society's interest in freedom of the press.

Rosenbloom, 403 U.S. at 83-84 (Marshall, J., dissenting).

> Justice Harlan suggested in *Rosenbloom*, or perhaps even entirely forbidden. Presumed damages to reputation might have been prohibited, or limited as in *Gertz*. . . .
>
> . . . . The necessary breathing room for speakers can be ensured by limitations on recoverable damages; . . . .

472 U.S. at 771 (White, J., concurring) (citation omitted).

Although *amici* disagree with any suggestion that independent judicial review of damages awards could ever take the place of the constitutional protection afforded by the *New York Times* rule, Justice White's opinions emphasize that it is the threat of unrestrained *damages*, not just abstract theories of liability, that leads to self-censorship and causes would-be critics of official conduct "to make only statements which 'steer far wider of the unlawful zone.'" *New York Times*, 376 U.S. at 279 (quoting *Speiser v. Randall*, 357 U.S. at 526). To the extent such damages awards exceed compensation for actual injury, they represent exactly the kind of "forbidden intrusion on the field of free expression" that all courts have a constitutional duty to prevent. *New York Times*, 376 U.S. at 285; *Bose*, 466 U.S. at 501.

III. LOWER FEDERAL COURTS AND OTHER STATE COURTS HAVE RECOGNIZED THE NEED FOR INDEPENDENT REVIEW OF DAMAGES AWARDS IN LIBEL CASES.

This Court has not had occasion to directly apply independent review to the amount of, and evidentiary support for, libel damages awards,[16] but lower federal courts

[16] Petitioners did not raise the claim that the damages award was excessive in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), and the Court found "no warrant for reexamining [the jury's] determination" of the amount of damages, *id.* at 461, after concluding sufficient "competent evidence [was] introduced to permit the jury to assess the amount of injury." *Id.* at 460. The Court accordingly reviewed the record as required under *Gertz*, 418 U.S. at 459-61, and thus the Court's citation to the 1894 case *City of Lincoln v. Power*, 151 U.S. 436 (1894), in this context was questionable. *See* Sack & Tofel, *First Steps Down the Road Not Taken: Emerging Limitations on Libel Damages*, 90 DICK. L. REV. 609, 618 (1986).

and state courts have applied the principles of *New York Times* and *Gertz* as requiring a searching review of such damages awards.

The Nevada Supreme Court relied on *Gertz* for its opinion that "in a public figure slander case against media defendants added scrutiny must be given to large compensatory damage awards because of their impact on free speech." *Nevada Indep. Broadcasting Corp. v. Allen*, 99 Nev. 404, 664 P.2d 337, 347 (1983). In that case, a gubernatorial candidate sued a broadcaster for defamation as a result of statements made by the moderator of a candidates' forum that was broadcast on the eve of the Republican primary election. The court affirmed the jury's determination of liability but not the jury's award of $675,000 in alleged compensation:

> We find the potential for inhibiting the vigorous exercise of First Amendment freedom in this case because the damage award far exceeds any conceivable damage that might have been done to Allen's political reputation or damages suffered as a result of an[y] humiliation or mental suffering brought about by the defamatory material presented in this case.

Id. As a result of its review of the record, the court held that "$50,000 is the maximum amount that could be reasonably awarded under the circumstances" and ordered a new trial unless the plaintiff agreed to remit all damages in excess of this amount. *Id.*

In *Outlet Co. v. International Sec. Group*, 693 S.W.2d 621 (Tex. App. 1985), the court similarly scrutinized

jury awards of compensatory and punitive damages in a suit arising out of a broadcaster's investigation into a multi-million dollar gun smuggling scheme. After ordering remittitur of one half of the compensatory damages award because insufficient evidence supported the full award, the court turned to punitive damages:

> [I]t is clear that the courts consider the punishment of error as running the risk of "inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. . . . [which] may lead to intolerable self-censorship."
>
> Here, [plaintiff] has recovered his actual as well as his special damages. Consequently, little is left to be served by the award of punitive damages except to punish and to set an example for others—both inviting a cautious and restrictive exercise of free speech and press. This consideration, together with the circumstances which we have considered with respect to the actual damage award lead us to conclude that the punitive damage award is excessive. We will therefore order that one-half of the punitive damages awarded be remitted.

Id. at 629-30 (quoting *Gertz*, 418 U.S. at 340).[17]

Lower federal courts have reached the same conclusion. In *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985), the court found insufficient evidence of actual malice and overturned a libel judgment in favor of the plaintiff. The court nevertheless addressed the issue of the amount of the damages award intended to "compensate" the plaintiff for her mental anguish and damaged reputation:

> The jury awarded plaintiff a total of seven million dollars in compensatory damages, which the trial court refused to reduce. No doubt such an enormous verdict chills media First Amendment rights. But a verdict of this size does more than chill an individual defendant's rights, it deep-freezes that particular media defendant permanently.

Id. at 141. After examining the evidence, the court concluded that neither the slight damage to plaintiff's reputation nor her "lacerated feelings are worth anything close to $7 million." *Id.*

The court in *Peoples Bank and Trust Co. v. Globe Int'l Publishing, Inc.*, 978 F.2d 1065 (8th Cir. 1992), agreed with the jury's finding of liability but disagreed with the district court's refusal to reduce the jury's award of $650,000 in compensatory damages for the plaintiff's damaged reputation. The court examined the record and concluded,

> This evidence, although sufficient to sustain an award, does not support the shockingly inflated award granted by the jury. Accordingly, we find an abuse of the district court's discretion in not granting a remittitur on compensatory damages, and remand for a substantial remittitur.

Id. at 1071.[18]

State and lower federal courts recognize, therefore, that independent judicial review of jury awards in libel cases—and the attendant power to order a remittitur to

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[17] *See also A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71, 86 (Tex. App. 1982) (the "Supreme Court has repeatedly recognized that the prospect of excessive damage awards, in wholly unpredictable amounts unrelated to the extent of actual harm caused, induces intolerable media self-censorship"); *Kidder v. Anderson*, 345 So.2d 922, 942-43 (La. App. 1977) (reducing amount of compensatory damages awarded by jury in libel suit "in light of the 'chilling effect' which the threat of potentially large defamation verdicts poses to the exercise of First Amendment rights"), *rev'd on other grounds*, 354 So.2d 1306 (La.), *cert. denied*, 439 U.S. 829 (1978).

[18] *But see id.* (finding, however, that "the district court did not abuse its discretion in declining to remit the award for punitive damages").

reduce that award to an amount justified by the evidence —is vital to the protection of First Amendment interests.[19]

IV. THE PROHIBITION OF PRESUMED AND PUNITIVE DAMAGES DOES NOT REMOVE THE NEED FOR INDEPENDENT JUDICIAL REVIEW OF LIBEL DAMAGES AWARDS.

In *Gertz*, this Court held that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." 418 U.S. at 349. Similarly, the Oregon Supreme Court in *Wheeler v. Green*, 286 Or. 99, 593 P.2d 777 (1979), ruled that the Oregon Constitution prohibits punitive damages in defamation cases: "In the sensitive area of free expression, however, the threat of large damage recoveries can easily inhibit the exercise of freedom of constitutionally protected expression, as well as its abuse." 593 P.2d at 789.[20]

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[19] The most recent report of the Libel Defense Resource Center (LDRC) on trial results, damages awards and appeals in libel cases emphasizes both the need and the efficacy of judicial intervention at the jury verdict stage. Of 34 libel awards reported from 1990 to 1993, LDRC reports that 41.2% were disturbed by the trial court on defendants' post-trial motions (including orders of JNOV, new trials, and remittitur) and 23.5% of all awards were subject to remittitur. Cases surveyed for the period 1980 to 1989 resulted in 28.5% disturbed on post-trial motions, including 16.5% on remittitur. At the appellate level, approximately 30% of libel awards were disturbed (including reduction of damages and reversal), including approximately 6% in which the amount of damages was reduced by the appellate courts. Comparable figures for the 1980 through 1989 period show 70% of all libel awards disturbed on appeal, including 17% (25 cases) in which the amount of damages was reduced. Libel Defense Resource Center Bulletin, 1994 Issue No. 1 (January 31, 1994).

[20] Significantly, the Oregon Supreme Court went on to note that "[t]his is likely to be particularly true in Oregon where the courts, having no power of remittitur, have little or no control over the amounts which juries award as punitive damages." *Id.*

It is deceptively easy to conclude that prohibition of these inherently unrestrained damages awards should be sufficient protection against the chilling effect of excessive jury verdicts.[21] Such arguments, however, ignore what has been characterized as "the part Alice-in-Wonderland, part Kafka nature" of libel judgments:

> Typically, compensatory damages are based on no more than subjective reports of psychic injury. A million dollars or more in this context is worse than arbitrary. A rule that permits a jury to pick that kind of a number out of thin air, without regard to actual, measurable injury mocks the word "compensation." It is not designed to result in fair and full redress. It is, instead, a license for the jury to vent its anger at the words spoken and whoever spoke them.

Sack & Tofel, *First Steps Down the Road Not Taken: Emerging Limitations on Libel Damages*, 90 DICK L. REV. 609, 612 (1986) (footnote omitted); *see* Van Alstyne, *First Amendment Limitations on Recovery From the Press*, 25 WM. & MARY L. REV. 793, 795-96 (1984) ("juries may tend to find whatever they are told is necessary for them to find if they thoroughly dislike the publisher, his publication, his general practice, or his business").

Justice Brennan, addressing the Court's attempt to limit recovery to "actual injury" in *Gertz*, observed:

> [T]he Court's broad-ranging examples of "actual injury," including impairment of reputation and standing in the community, as well as personal humilia-

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[21] Indeed, Justice White argued as much in *Gertz*:

> [I]f the Court's principal concern is to protect the communications industry from large libel judgments, it would appear that its new requirements with respect to general and punitive damages would be ample protection.

418 U.S. at 391 (White, J., dissenting).

> tion, and mental anguish and suffering, inevitably allow a jury bent on punishing expression of unpopular views a formidable weapon for doing so. Finally, even a limitation of a recovery to "actual injury"—however much it reduces the size or frequency of recoveries—will not provide the necessary elbowroom for First Amendment expression.

418 U.S. at 367 (Brennan, J., dissenting.)

Certainly, a prohibition against *any* award of punitive damages may prevent the least restrained and openly punitive element of libel awards. It does not, however, prevent the jury from venting its anger in the form of inflated general or "compensatory" damages. The uncomfortable fact, as suggested by Messrs. Sack and Tofel, *supra*, is that juries can and do use the highly subjective weapon of libel damages to punish unpopular speech and speakers.[22] Even when there appears to be an attempt to rationalize and articulate the basis for awards, the result is often bizarre.[23]

Regardless of the care with which this Court and others articulate standards of fault, burdens of proof, quanta of evidence, and other constitutinal limitations on libel judgments, it is ultimately the unrestrained award of money damages that threatens the "uninhibited, robust, and wide-

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[22] *See, e.g., Peoples Bank and Trust*, 978 F.2d at 1070-71 (total jury award of $1.5 million against tabloid publisher); *Lerman*, 745 F.2d at 141 (jury award $7 million in compensatory and $33 million in punitive damages against publisher of adult magazine).

[23] *See* Sack & Tofel, *First Steps, supra*, at 613-15 (discussing *McCoy v. Hearst Corp.*, 174 Cal. App. 3d 892, 220 Cal. Rptr. 848 (1985), *rev'd*, 42 Cal. 3d 835, 231 Cal. Rptr. 518, 727 P.2d 711 (1986), *cert. denied*, 481 U.S. 1041 (1987), in which the court of appeal summarily upheld a million dollar damages award in exactly the same amount for each of three plaintiffs and assessed those awards almost equally among the three defendants without regard to the absence of measurable harm, the individual injuries alleged by each plaintiff, or the varying degrees of culpability of each defendant).

open" coverage of public issues. That is the point at which the need for constitutional protection is often most compelling. Yet it is precisely at that point that the Oregon courts would deny their authority to act.

The Oregon Supreme Court in the case before this Court has interpreted the state constitution to permit judicial review of damages awards in only two areas: (1) "[i]f there is *no* evidence to support the jury's decision . . . then the trial court or the appellate courts can intervene to *vacate* the award," 851 P.2d at 1096 (emphasis added); and (2) "to test the sufficiency of the jury instructions," *id.* at 1097. Neither limited form of review allows the courts to ensure that First Amendment concerns are addressed.

The power to vacate an award that is unsupported by any evidence is important, but it simply does not address the situation in which sufficient evidence exists to support a damages award but that evidence does not support the *amount* of damages awarded by the jury. In the *Nevada Independent Broadcasting* case discussed above for example, the jury awarded $675,000 in "compensatory" damages, but the court found on review of the record that the maximum amount a reasonable jury would have awarded was $50,000. 664 P.2d at 347. Because *some* evidence existed to support a damages award, Oregon courts in identical circumstances would be compelled to uphold the jury's entire verdict, even though it is over 13 times more than the maximum amount a reasonable jury would have awarded.

Sufficiency of jury instructions similarly does not ensure that a jury will not be swayed by passion or prejudice to inflate a "compensatory" or punitive damages award. Again, the Nevada Supreme Court in *Nevada Independent Broadcasting* "carefully examined the instructions claimed by appellants to be erroneous and [f]ound no prejudicial error." *Id.* at 345. Yet, that same court concluded that

the jury's award was "not supported by the evidence and therefore must have been given under the influence of passion or prejudice." *Id.* at 347. The inability to remedy such blatant error can only result in the severe chill to the free exercise of First Amendment freedoms that has historically been the central concern of this Court.

CONCLUSION

This Court has long recognized that independent judicial review in First Amendment cases is a constitutional duty of all courts that cannot be delegated to the trier of fact. That constitutional duty must include review of damages awarded in libel and related cases, to prevent such awards from being used to punish and deter protected speech. The Oregon rule that prevents effective judicial review of damages awards is inconsistent with the First and Fourteenth Amendments and should be struck down.

Respectfully submitted,

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APPENDIX

APPENDIX

IDENTITY OF INDIVIDUAL *AMICI*

CBS Inc. is the owner of television and radio broadcasting stations and the operator of national television and radio networks engaged in the dissemination of news and public affairs programming.

Cable News Network, Inc. creates, produces and distributes several television programming services nationally and worldwide, including Cable News Network ("CNN") and CNN International ("CNNI").

Capital Cities/ABC, Inc. through its subsidiaries, owns national radio and television networks, television and radio stations, daily and weekly newspapers, and other publications, all of which are engaged in the gathering and dissemination of news to the public.

The Copley Press, Inc. publishes ten daily newspapers in California and Illinois, whose combined circulation is approximately 750,000.

The Chronicle Publishing Company publishes the *San Francisco Chronicle* with a daily circulation of 565,000 and a Sunday circulation of 730,000. Chronicle Broadcasting Co., a division of The Chronicle Publishing Company, operates three television stations, and Western Communications, another division, operates cable television systems serving approximately 330,000 subscribers in three states.

Dow Jones & Company, Inc. publishes, inter alia, *The Wall Street Journal*, the largest circulation daily newspaper in the country, as well as *Barron's National Business and Financial Weekly, Dow Jones News Services* and through its Ottaway Newspapers, Inc. subsidiary, newspapers in 29 communities in 13 states.

Providence Journal Company owns and operates nine broadcast television stations; through its subsidiaries Colony Communications, Inc. and King Videocable Company operates cable television systems serving approximately 770,000 subscribers in nine states; and publishes newspapers in Providence, R.I. collectively known as The Journal-Bulletin.

Reuters America, Inc. is the primary North American operating company of Reuters Holdings PLC, the international news and financial information organization. Reuters supplies information to both business subscribers and to the news media. It obtains its information from approximately 160 exchanges and over-the-counter markets, from data contributed directly by more than 3,715 subscribers in 82 countries and from a network of some 1,270 journalists and photographers.

Time Inc. is the largest publisher of general circulation magazines in the United States. Among the magazines it publishes are TIME, FORTUNE, SPORTS ILLUSTRATED, PEOPLE, MONEY, LIFE, and ENTERTAINMENT WEEKLY.

Westinghouse Broadcasting Company, Inc., through its subsidiaries, owns television and radio stations in major markets and produces and distributes programming for broadcast and cable television.

The Association of American Publishers, Inc. is the major national association in the United States of publishers of general books, text books and educational materials. Its more than 200 members include most of the major commercial book publishers in the United States and many smaller or nonprofit publishers including university presses and scholarly associations.

The National Association of Broadcasters ("NAB"), organized in 1922, is a nonprofit incorporated trade association that serves and represents radio and television stations and networks. NAB's members cover, produce and

broadcast the news to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning the activities of government and other matters of public interest and concern.

The Newspaper Association of America ("NAA") is a nonprofit corporation serving approximately 1,250 newspapers in the United States and Canada. The majority of these are daily newspapers that account for more than 90 percent of the newspaper circulation of the United States. NAA membership also includes a substantial number of non-daily U.S. newspapers.

Radio-Television News Directors Association is the principal professional association of electronic journalists in the United States. The Association's members gather, edit and disseminate news and other public affairs information carried by the national broadcast and cable networks, local radio and television broadcast stations, and cable television systems.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working reporters and editors dedicated to defending the First Amendment and freedom-of-information interests of the news media and public. The Reporters Committee has provided representation, legal guidance and research in virtually every major press freedoms case litigated since 1970.

The Society of Professional Journalists is a voluntary, nonprofit organization of 14,000 members. The Society is the largest and oldest organization of journalists in the United States, representing every branch and rank of print and broadcast journalism.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

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Petitioners,

v.

KARL L. OBERG,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF *AMICI CURIAE* FOR THE AMERICAN COUNCIL OF LIFE INSURANCE, THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, THE ALLIANCE OF AMERICAN INSURERS AND THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

This brief addresses the following question:

Whether, and to what extent, the Due Process Clause of the Fourteenth Amendment requires state courts to review punitive damages verdicts for excessiveness.

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INTERESTS OF THE AMICI

The *amici* are trade associations representing the interests of many of the life, health and property and casualty insurers in the United States.[1] Specifically, the American Council of Life Insurance, the largest life insurance trade association in the United States, represents the interests of 640 member life insurance companies; these companies currently underwrite 90.9 percent of

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[1] Counsel for both the Petitioners and the Respondent have consented to the filing of this brief. Their consents are on file with the Clerk.

the life insurance in force in legal reserve life insurance companies in the United States. The National Association of Independent Insurers, the largest association of property and casualty insurers in the country, represents over 560 property and casualty insurers writing over one-quarter of the property and casualty insurance sold in the United States. The Alliance of American Insurers represents approximately 180 insurance companies that write property and casualty insurance nationwide, with annual premiums representing over ten percent of such insurance. The American Insurance Association represents 195 property and casualty insurers; these companies are affiliated with 65,000 independent insurance agents nationwide.

Defining the procedural and substantive limitations that the Due Process Clause of the Fourteenth Amendment imposes on punitive damages is an issue of vital importance to the *amici's* members. In recent years, courts have permitted juries to assess substantial punitive damages awards against insurers, often in the absence of due process constraints, and have deferred to those awards even though they are imposed without meaningful standards and bear no rational, objective relationship to the purposes of punishment and deterrence. These decisions drastically and unpredictably enlarge the risks facing insurers, which must rely on a predictable allocation of risks and costs in providing insurance, and jeopardize their ability to offer affordable insurance. Because of their genuine interest in the constitutionality of current punitive damages law, therefore, the *amici* have filed briefs in this Court in prior cases involving this issue. *See, e.g., TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1990); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

This brief presents to the Court the views of the *amici*, based on the experiences of their broad-based constituencies, on two of the issues in this case: (1) whether Oregon's refusal to provide any judicial review of juries' punitive damages awards for excessiveness violates defendants' procedural due process rights

and (2) what factors courts should be required to consider in conducting such a review.[2]

STATEMENT

1. Because Petitioners set the facts forth fully in their brief, the *amici* only summarize the facts here. Respondent Karl Oberg ("Oberg") was injured while driving an all-terrain vehicle that had been manufactured and sold by petitioners Honda Motor Co., Ltd.; Honda R&D Co.; and American Honda Motor Co., Inc. ("Honda"). Appendix to Petition for Certiorari ("Pet. App."), at 1a. Oberg then filed suit, in an Oregon state court, against Honda, including claims for both negligence and strict liability. *Id.* A jury awarded Oberg $919,390.39 in compensatory damages (which was reduced to $735,512.31 on the basis of comparative fault) and $5 million in punitive damages. *Id.* at 1a n.1.

2. Honda filed motions for a new trial and for judgment notwithstanding the verdict. In its motions, Honda argued, among other things, that the punitive damages award was grossly excessive. Petition for Certiorari ("Pet."), at 3-4. The trial court denied those motions without explanation. Pet. App. 89a-90a.

3. Honda appealed to the Oregon Court of Appeals, arguing, among other things, that the award of punitive damages was excessive and violated its rights under the Due Process Clause. Pet. App. 1a-2a. However, the Court of Appeals refused to entertain Honda's challenge to the amount of the award because the Oregon Constitution "prohibits trial and appellate courts from setting aside a verdict on the ground that it is excessive." *Id.* at 86a-87a. Despite Honda's contentions, the Court of Appeals did not believe that the Due Process Clause requires courts to review jury verdicts for excessiveness. *Id.* at 82a-83a.

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[2] This case also presents the issue of whether, and in what fashion, courts are required, as a matter of procedural due process, to review juries' awards of *compensatory* damages. The *amici* do not address that issue in this brief.

4. The Oregon Supreme Court affirmed, holding that the Due Process Clause does not require "a form of post-verdict or appellate review that includes the possibility of remittitur." Pet. App. 25a. It concluded that Oregon's scheme for awarding punitive damages complies with the Due Process Clause because (1) juries are required to consider certain "objective" criteria when deciding whether to award punitive damages and how large the award should be;[3] (2) trial and appellate courts may vacate the award, in its entirety, if the jury was not properly instructed; and (3) trial and appellate courts may vacate the award, in its entirety, if there was "no evidence" to support the award. *Id.* at 20a-27a.

SUMMARY OF ARGUMENT

I. Applying the three-part test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), it is clear that the Due Process Clause of the Fourteenth Amendment requires state courts to review punitive damages awards made by juries in order to determine whether those awards are excessive. *First*, punitive damages awards are often sizable and deprive defendants of significant "property" interests within the meaning of the Due Process Clause. *Second*, denying any judicial review of such awards for excessiveness, as Oregon does, creates an unacceptable risk that defendants will be erroneously deprived of their property. When a jury acts under the influence of passion and prejudice, and that bias is reflected only in the size of the award, there is no way to correct the injustice if courts lack the power to interfere with the award. *Finally*, neither plaintiffs nor the state of Oregon would be significantly burdened by a requirement of

[3] In this case, for example, the jury was instructed to consider five criteria: (1) the likelihood at the time of the sale that serious harm would arise from the defendants' misconduct, (2) the degree of the defendants' awareness of that likelihood; (3) the duration of the misconduct; (4) the attitude and conduct of the defendants upon notice of the alleged condition of the vehicle; and (5) the financial condition of the defendants. Pet. App. 22a-23a n.11.

some judicial review for excessiveness of juries' punitive damages awards. Defendants in Oregon are already permitted to challenge such awards on other grounds, and the many states that have provided for excessiveness review have not found that review to be unduly burdensome.

II. Oregon stands apart in its refusal to provide for some judicial review for excessiveness of punitive damages awards -- and, in doing so, tolerates an unacceptable risk of depriving litigants of fundamental rights to due process. This case thus affords the Court an opportunity to clarify not only that the Due Process Clause requires some judicial review of these awards, but also the minimum standards that courts should apply in determining whether an award of punitive damages is so excessive as to violate the Due Process Clause.

It is clear from this Court's prior decisions that the Due Process Clause does impose some limitation on the amounts of punitive damages that civil juries can award and that "concerns of reasonableness" enter into determining whether an award is constitutionally excessive. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1990). But the Court has not yet addressed, as a general matter, the standards that courts should use in determining whether particular awards are so excessive as to violate the Due Process Clause.

The *amici* do not propose that this Court formulate some kind of ironclad "test" for determining whether particular punitive damages awards are constitutionally excessive. Nor do they propose that the Court attempt to make an exhaustive enumeration of the factors that courts should consider in making such a determination. They do, however, propose that the Court articulate a non-exclusive list of relatively objective and measurable criteria for courts to consider in determining whether particular awards are so excessive as to violate the Due Process Clause -- such as the extent to which the defendant profited from its misconduct; the plaintiff's reasonable litigation costs, to the extent not otherwise provided by statute; the quantifiable harm that has resulted from the defendant's misconduct, as well as the

quantifiable harm that was substantially likely to result from that misconduct; the size of legislative penalties for misconduct similar to the defendant's conduct; and the size of punitive damages awards rendered in other, similar cases. Requiring courts to consider such criteria would provide them with guidance in exercising their discretion, and help to avoid the danger of arbitrary judicial action, while retaining for them the freedom to accommodate their analysis to the specific demands of particular cases.

ARGUMENT

I. OREGON'S REFUSAL TO PROVIDE ANY JUDICIAL REVIEW OF JURIES' PUNITIVE DAMAGES AWARDS FOR EXCESSIVENESS VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

In assessing whether the Due Process Clause of the Fourteenth Amendment requires the use of particular procedures in civil cases, this Court in recent years has employed the three-part test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976).[4] That test requires the Court to consider:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures [currently] used, and the probable value, if any, of additional or substitute procedural

[4] In *Medina v. California*, 112 S. Ct. 2572, 2576 (1992), the Court held that "the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which, like the one at bar, are part of the criminal process." However, awards of punitive damages, at least in cases between private parties, are not "part of the criminal process." *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989) (the Eighth Amendment, which places constraints on "criminal process and . . . direct actions initiated by government to inflict punishment," does not "apply to awards of punitive damages in cases between private parties").

> safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.[5] When the foregoing criteria are applied to Oregon's denial of any review for excessiveness, it is clear that denying such review violates the Due Process Clause.

A. Punitive Damages Awards Implicate Sizable Property Interests

There can be no question that an award of punitive damages deprives a defendant of "property" within the meaning of the Due Process Clause.[6] Nor can there be any question that such awards are often huge. *See, e.g., Haslip*, 499 U.S. at 61 (O'Connor, J., dissenting)("Recent years . . . have witnessed an explosion in the frequency and size of punitive damages awards"); W. Volz & M. Fayz, *Punitive Damages and the Due Process Clause: The Search for Constitutional Standards*, 69 U. Det. Mercy L. Rev. 459, 462 n.17 (1992) (observing that the trend towards larger punitive damages awards, as noted by previous commentators, "appears to continue unabated," and citing a number of multimillion-dollar verdicts rendered in the period 1990-1991).

[5] As discussed *infra*, in Part I-C of the Argument, the third prong of the *Mathews* analysis is somewhat modified when, as in the present case, the dispute is between private parties. *Connecticut v. Doehr*, 111 S. Ct. 2105, 2112 (1991) (giving primary attention to the additional burdens imposed upon the opposing party). However, in the present case, the result should be the same under either standard.

[6] As petitioners have correctly noted, this proposition is so obvious that the Court has not even paused to discuss it when analyzing due process challenges to punitive damages awards. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993).

B. Without Some Judicial Post-Verdict Review For Excessiveness Of Punitive Damages Awards, There Is A Significant Risk That Defendants Will Be Erroneously Deprived Of Their Property

There are at least two reasons why denying any judicial post-verdict review for excessiveness of punitive damages awards creates an unacceptable risk that defendants will be erroneously deprived of their property.

First, it is widely recognized, and has often been noted by this Court, that when awarding punitive damages, juries sometimes make those awards under the influence of passion and prejudice. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (juries may "use their discretion selectively to punish expressions of unpopular views"). Indeed, jurors "are more susceptible to such influences than judges." *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2728 (1993) (O'Connor and White, JJ., dissenting). This is a particular danger with respect to certain kinds of defendants, such as insurance companies, like the members of the *amici*, or large out-of-state corporations, like Honda. *See, e.g., TXO Prod. Corp.*, 113 S. Ct. at 2723 (plurality opinion) (recognizing the possibility of "[jury] prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident"); *id.* at 2737 (O'Connor, Souter, and White, JJ., dissenting) ("Courts long have recognized that jurors may view large corporations with great disfavor"); M. Peterson, S. Sarma & M. Shanley, *Punitive Damages: Empirical Findings* 22-24, 50 (Rand Institute for Civil Justice 1987) ("Punitive awards against businesses were far larger than those against individuals in both personal injury and business/contract cases").

It has long been a fixture of this Court's due process jurisprudence that everyone is entitled, at a minimum, to be judged by a neutral and unbiased decisionmaker. *See, e.g., In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process. Fairness requires an absence of actual bias in the trial of cases"). When juries

render excessive punitive damages awards under the influence of bias or prejudice, and courts are denied the power to correct the effects of that prejudice, defendants are clearly deprived of what this Court has long regarded as a basic constitutional right to a fair trial. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989) ("The parties agree that due process imposes some limits on jury awards of punitive damages, and it is not disputed that a jury award may not be upheld if it was the product of bias or passion . . ."); *Haslip*, 499 U.S. at 41 (Kennedy, J., concurring) ("A verdict returned by a biased or prejudiced jury no doubt violates due process, and the extreme amount of an award compared to the actual damage inflicted can be some evidence of bias or prejudice in an appropriate case"); *TXO Prod. Corp.*, 113 S. Ct. at 2729 (O'Connor and White, JJ., dissenting) ("Influences such as caprice, bias, passion, and prejudice are antithetical to the rule of law. If there is a fixture of due process, it is that a verdict based on such influences cannot stand").

The only way to correct such deprivations of due process is to provide courts with the power to review and modify the inflated award. Contrary to the holding of the court below, the protections currently afforded by Oregon -- protections that do not include judicial review for excessiveness -- simply will not suffice to address such erroneous deprivations.

It is true that, as the court below pointed out, Oregon trial courts instruct juries to consider a number of specific factors when determining punitive damages. Pet. App. 21a-22a. Juries, however, still have broad discretion in determining the amount of such awards, leaving ample room for prejudice against particular defendants to infect the process.[7] It is also true that Oregon

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[7] Generally, in Oregon, "the finder of fact must determine what punitive damages, if any, to award" by looking at a number of factors that "may be relevant, including the seriousness of the hazard to the public, the attitude and conduct of the wrongdoer upon learning of the hazard, the

appellate courts can review the sufficiency of the trial court's instructions (*id.* at 27a-28a), but doing so does not protect against the danger of inflated awards rendered under the influence of passion and prejudice. That danger exists even when the jury has been properly instructed on how to make its determination. Finally, although Oregon courts may vacate an award of punitive damages, in its totality, when there is no evidence at all to support any award of punitive damages (*id.* at 27a), that protection will not affect those cases in which it is reasonable to award *some* punitive damages, but not in the amount determined by the jury.[8]

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number and position of employees involved in causing or covering up the misconduct, the duration of the misconduct and/or its cover-up, the financial condition of the wrongdoer, and prior or potential punishment from similarly situated plaintiffs or other sources." Pet. App. 24a (citing cases). In product liability actions, such as the present case, "[p]unitive damages shall be determined and awarded based upon the following criteria: (a) The likelihood at the time that serious harm would arise from the defendant's misconduct; (b) The degree of the defendant's awareness of that likelihood; (c) The profitability of the defendant's misconduct; (d) The duration of the misconduct and any concealment of it; (e) The attitude and conduct of the defendant upon the discovery of the misconduct; (f) The financial condition of the defendant; and (g) The total deterrent effect of other punishment imposed on the defendant as a result of the misconduct . . . ." Or. Rev. Stat. § 30.925(3).

[8] It is also true that most, if not all states (and presumably Oregon as well) allow the parties' counsel, through *voir dire*, to challenge the seating of jurors whom they believe to be biased against their clients. *See* 5 *Am. Jur. Trials* 149 (1966) ("In most American jurisdictions, if not all, the law grants an absolute right, upon demand, to have some voir dire examination take place"). However, it is not always possible to ascertain bias before the trial has begun. And it is for just that reason that the vast majority of states, despite the protections afforded in the *voir dire* process, also permit their courts to review the jury's ultimate verdict to determine whether the jury arrived at an inflated award under the influence of passion and prejudice. *See* Pet. 6 & n.3.

Second, denying any review for excessiveness creates an unacceptable risk of error because even the most fair and impartial jury lacks the proper framework for determining what amount of punitive damages will best accomplish the goals of punishment and deterrence. The jury, as an institution, is not particularly well-suited to making broad policy decisions and is not politically accountable for those decisions. Quite the contrary, juries face individualized facts and are particularly ill-equipped to take into account the broad impact of a punitive award on others and thus to determine when a penalty furthers the state's legitimate goals. *See, e.g.*, J. Sales & K. Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117, 1159 (1984); D. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1258, 1320-21 (1976).[9]

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[9] As Professor Clarence Morris so aptly explained almost sixty years ago:

> In determining whether or not the defendant has been a "reasonably prudent man" or an "intentional wrongdoer," the jury's task is to reflect the social values of the community; the jury evaluates the defendant's past behavior, it determines whether or not his past conduct should be condemned. But in fixing the amount of punitive damages the considerations all look to the future conduct of the defendant and others; the question is: how large a judgment is needed to discourage this sort of conduct in the future? Evaluation of past conduct is a different type of problem from control of future behavior. It is evident that problems of social control may require more technical skill than jurymen have or can acquire. Probably, many on jury panels can not think of punishment as a means to an end, as an expedient for reformation and deterrence, and only regard punishment as legal, justifiable revenge.

C. Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1179 (1931).

C. Neither Plaintiffs Like Oberg, Nor The State Of Oregon, Would Be Significantly Burdened By A Requirement That There Be Some Judicial Post-Verdict Review Of Punitive Damages Awards

There is a final factor to be considered under *Mathews v. Eldridge* when, as in this case, the dispute is between private parties: the burdens that the additional procedural requirement (review for excessiveness) would impose, with "principal attention to the interest of the party seeking [punitive damages]" and with "due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections." *Connecticut v. Doehr*, 111 S. Ct. 2105, 2112 (1991).

Neither plaintiffs like Oberg nor the state of Oregon would be significantly burdened by the additional costs of litigating the issue whether a jury's award of punitive damages was excessive. Indeed, as noted above, Oregon already permits defendants to challenge punitive damages awards on other grounds -- i.e., on the basis of improper jury instructions and the absence of evidence to support any award of punitive damages. Moreover, as petitioners have shown, the vast majority of other states provide some sort of review for excessiveness and thus clearly have not found the additional burdens to be unmanageable. Pet. 6 & n.3. Nor, obviously, do plaintiffs like Oberg have any cognizable interest in preserving awards that are constitutionally excessive.

II. WHEN REVIEWING A JURY'S AWARD OF PUNITIVE DAMAGES TO DETERMINE WHETHER IT IS EXCESSIVE, COURTS SHOULD, AT A MINIMUM, BE REQUIRED TO CONSIDER CERTAIN OBJECTIVE INDICIA OF WHETHER THE AWARD IS RATIONALLY RELATED TO THE GOALS OF DETERRENCE AND PUNISHMENT

Under this Court's prior decisions, it is clear that the Due Process Clause imposes a limitation on the amounts of punitive damages that civil juries can award. *See, e.g., Waters-Pierce Oil*

Co. v. Texas, 212 U.S. 86, 111 (1909) (reviewing an award of extra-compensatory damages to determine whether it was so "grossly excessive as to amount to a deprivation of property without due process of law"); *Missouri Pacific Ry. v. Tucker*, 230 U.S. 340, 351 (1913) (jury award struck down as "grossly out of proportion to the possible actual damages" and "arbitrary and oppressive"); *Haslip*, 499 U.S. at 23-24 (reviewing an award of punitive damages to determine whether it was so disproportionately large as to "cross the line into the area of constitutional impropriety") (footnote omitted). Although the Court has never precisely defined the contours of that limitation, it has held that "general concerns of reasonableness . . . . properly enter into the constitutional calculus." *Haslip*, 499 U.S. at 18; *see also TXO Prod. Corp.*, 113 S. Ct. at 2720 (plurality opinion) (citing *Haslip*).

This "constitutional calculus" thus remains elusive. The Court has never specifically addressed the *standards* that courts should use in deciding whether a jury's award of punitive damages is so grossly unreasonable as to violate the Due Process Clause. In *Haslip*, the Court approved the totality of Alabama's scheme for reviewing such awards, but did not indicate which aspects of that scheme (if any) were constitutionally required. 499 U.S. at 20-23. Similarly, in *TXO Prod. Corp.*, the Court held that the trial and appellate courts had made an adequate review of the punitive damages award, without indicating which aspects of that review (if any) were constitutionally required. 113 S. Ct. at 2724.

The *amici* suggest that, in reviewing awards of punitive damages under the Due Process Clause, courts should give attention to the purposes underlying such awards: to punish misconduct and to deter its repetition.[10] Specifically, courts

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[10] This Court has consistently identified deterrence and punishment as the principal purposes underlying punitive damages; so have the great majority of jurisdictions. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986); *Browning-Ferris Indus. v. Kelco*

should be required to consider whether a particular award is rationally related to the goals of deterrence and punishment -- an approach that this Court approved in *Haslip*. *See Haslip*, 499 U.S. at 21 (approving Alabama's standards for appellate review of punitive damages awards because that review "makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition"). And, to ensure that courts consult something other than their own preconceptions in evaluating the rationality of such awards, courts should be required to consider certain objectively measurable indicia of what amounts are reasonably necessary to serve the goals of deterrence and punishment.

The *amici* are not proposing that the Court formulate an ironclad "test" for determining the constitutionality of punitive damages awards, but merely that it articulate a non-exclusive list of factors, none of which would necessarily be dispositive in any particular case, for courts to consider when analyzing the constitutionality of such awards. The states, of course, would remain free to determine that awards are excessive under state-law principles, even when those awards do not violate the Due Process Clause, and to legislate appropriate standards for assessing whether the awards are excessive under state law.[11]

Disposal, Inc., 492 U.S. 257, 275 (1989); *Haslip*, 499 U.S. at 19; *see also* 1 J. Ghiardi & J. Kircher, *Punitive Damages Law and Practice* § 4.14 (1992); J. Sales & K. Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117, 1126 (1984); Restatement (Second) of Torts § 908(1) (1979).

[11] *See, e.g., Transportation Ins. Co. v. Moriel*, No. D-1507, 1994 Tex. LEXIS 23 (Tex. Feb. 2, 1994), at *59-61 (although court did not reach the issue of whether Texas' procedures for assessing and reviewing punitive damages violated the Due Process Clause, it exercised its authority under the common law to modify those procedures).

A. Courts Should Consider The Extent To Which The Defendant Profited From Its Misconduct

The amount of gain or profit that the defendant has received from the plaintiff as a result of his misdeeds is an appropriate element in measuring deterrence. *See Haslip*, 499 U.S. at 22 (in approving Alabama punitive damages analysis, the Court noted that one of the many factors Alabama courts look to is the "profitability to the defendant of the wrongful conduct"); *see also* D. Dobbs, *Ending Punishment In "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. 831 (1989); Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1258, 1286 (1976). The defendant's profits from his misconduct -- or, in some cases, where the defendant fails to profit as expected, his expected profits -- are objectively-based and often ascertainable without substantial difficulty. Removing the actual or expected gain, in addition to requiring the defendant to compensate the plaintiff for his actual losses, makes it less likely that the defendant will repeat the conduct. A gain-based measure of this sort sends a clear signal to defendants that such misdeeds do not pay and, thus, will often fully serve the deterrent function.

B. In Some Cases, Courts Should Also Consider The Plaintiff's Reasonable Litigation Costs

A "gain-based" measure of extra-compensatory damages may not always adequately serve the deterrent function; it may over- or underserve this purpose. A defendant may, for example, escape effective deterrence when its conduct is rarely challenged in private litigation -- i.e., when the cost of private enforcement exceeds the plaintiff's damages. *See* J. Mallor & B. Roberts, *Punitive Damages: Toward a Principled Approach*, 31 Hastings L. J. 639, 650 (1980); *cf.* Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. at 1285 (noting that the deterrent effect of punitive damages depends, in part, on "the manufacturer's perception of the likelihood of his being identified and punished"). In such a case, an appropriate measure of deterrence may include the plaintiff's reasonable litigation costs,

to the extent not otherwise provided by statute. *See Haslip*, 499 U.S. at 22 (in approving Alabama punitive damages analysis, the Court noted that one of the many factors Alabama courts look to is "all the costs of litigation"); *see also* Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. at 890-94. Shifting the plaintiff's reasonable litigation costs to the defendant in these types of cases could achieve appropriate deterrence by encouraging otherwise uneconomical litigation and, at the same time, removing the defendant's incentive to continue his misconduct. This measure, as with the gain-based measure, is relatively objective and, given the courts' experience with assessing attorneys' fees, hardly unfamiliar.

C. Courts Should Consider The Quantifiable Harm That Has Resulted From The Defendant's Misconduct And The Quantifiable Harm That Was Substantially Likely To Result From That Misconduct

Although extra-compensatory damages based on a deterrence-based measure will often serve simultaneously to deter and punish, there may be cases in which such a measure underserves the punitive function -- as, for example, where a defendant expects no gain from his misconduct. In such cases, adjusting an extra-compensatory award to serve its punitive purpose may be necessary. *Cf.* Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. at 1317 ("[t]he punishment function is the final factor to be considered in developing a standard for the measurement of punitive damages").

Whether a defendant "deserves" punishment beyond an amount necessary to deter his future misconduct turns on the gravity of his misdeeds. *See* D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 6 (1982). Two relatively objective and verifiable measures of how serious the defendant's misconduct was are (1) any quantifiable harm that the misconduct has caused to the plaintiff and (2) any additional, quantifiable harm that, at the time of the defendant's misconduct, was substantially likely to result from that misconduct. *See TXO*

Prod. Corp., 113 S. Ct. at 2721-22 (analyzing the financial harm that was likely to result, but did not result, from the defendant's misconduct); *Haslip*, 499 U.S. at 21 (in approving Alabama punitive damages analysis, the Court noted that one of the many factors Alabama courts look to is "whether there is a reasonable relationship between the punitive damages and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred").

The harm that the plaintiff suffered from the defendant's misconduct can generally be quantified by looking at the amount of compensatory damages awarded. Provided that the compensatory award itself is supportable and not improperly inflated, courts reviewing the award should give primary, if not exclusive, consideration to that figure in quantifying the harm. However, when a plaintiff has provided the jury (and a reviewing court) with a reasonable and demonstrable basis for quantifying other kinds of harm (such as any additional, unrealized harm that the plaintiff might have suffered), a court reviewing the punitive damages award should also take those harms into consideration.

D. Courts Should Also Compare The Award With Awards In Similar Cases And With Legislative Penalties For Similar Misconduct

Two more relatively objective and measurable benchmarks for determining what amount of punitive damages will serve the punitive purpose are legislative penalties for misconduct similar to the defendant's conduct and punitive damage awards made in other similar cases.

What is an appropriate punishment for a defendant's misconduct may, in some cases, be apparent from legislative penalties for similar conduct. Many states have enacted statutes prescribing penalties, either civil or criminal, for certain intentional or negligent conduct that is similar to conduct that exposes a defendant to punitive damages. That legislative assessment concerning what "punishment" is appropriate serves an important role in ascertaining whether an extra-compensatory award for comparable conduct not subject to the legislative

penalty is rationally related to that purpose. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. at 300-01 (O'Connor and Stevens, JJ., concurring in part and dissenting in part); *Haslip*, 499 U.S. at 23 (while declining to accord conclusive weight to analogous legislative fines, the Court examined the Alabama legislative penalty for comparable conduct).

Also, in at least some cases, comparing the jury's punitive damages award with the awards made in other cases will assist a reviewing court in determining whether a jury (perhaps under the influence of passion and prejudice) has made an award that greatly exceeds the amount rationally necessary to punish the defendant. *See TXO Prod. Corp.*, 113 S. Ct. at 2719-2720 (plurality opinion) (refusing to make such comparisons, standing alone, a "test" of the presumptive constitutionality of an award, but acknowledging that "the fact that an award is significantly larger than those in apparently similar circumstances might, in a given case, be one of many relevant considerations"); *Haslip*, 499 U.S. at 21 (the Court noted with approval that when reviewing punitive damages awards, the Alabama Supreme Court "first undertakes a comparative analysis").

These objective factors are, of course, only guides for courts charged with reviewing punitive damages awards. But consideration of these factors by reviewing courts should ensure that litigants are not subjected to punitive damages that are constitutionally excessive and that punitive damages -- when warranted at all -- are awarded in amounts that reasonably serve their deterrent and punitive purposes.

CONCLUSION

Because Oregon does not provide for any post-trial judicial review of punitive damages awards for excessiveness, much less for post-trial judicial consideration of any objective factors for determining whether a jury's punitive damages award is constitutionally excessive, its procedures do not comport with the requirements of the Due Process Clause. Therefore, the judgment below should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1993

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD.; AND AMERICAN HONDA MOTOR CO., INC.,

Petitioners,

v.

KARL L. OBERG,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OREGON

Brief of the States of Hawaii, Kansas, Minnesota, Mississippi, Montana, and Oregon as Amici Curiae Supporting Respondent

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QUESTION PRESENTED

Whether a State's decision to provide limited judicial review of a jury's punitive damages award violates the Due Process Clause.

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No. 93-644

In the Supreme Court of the United States

OCTOBER TERM, 1993

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD.; AND AMERICAN HONDA MOTOR CO., INC.,

Petitioners,

v.

KARL L. OBERG,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

Brief of the States of Hawaii, Kansas, Minnesota, Mississippi, Montana, and Oregon as Amici Curiae Supporting Respondent

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INTEREST OF AMICI CURIAE

Oregon and the other amici States provide either by statute or case law for the recovery of punitive damages. They also provide procedural protections to ensure that punitive damages are assessed fairly. Many States have passed legislation to further that goal. They have capped punitive damages awards, provided for bifurcated trials, established criteria that limit a jury's discretion to award punitive damages, or required heightened standards of proof. The States in short have exercised their judgment in determining the procedures that best advance their

interests, consistent with the underlying due process requirement that those procedures be fair.

For its part, Oregon channels the jury's discretion to award punitive damages by providing that any award be based on specific statutory criteria and by imposing a heightened burden of proof, clear and convincing evidence. An Oregon court, however, may not re-examine the damages the jury awarded to determine if, in the court's view, the award is excessive. The Oregon Constitution prohibits state courts from engaging in this form of judicial review, a limitation that defendants claim denies them due process.

Oregon's interest in this case arises out of defendants' challenge to its constitutional provision protecting the integrity of jury verdicts. The provision was adopted more than 80 years ago. It applies generally to all jury verdicts, and it reflects the same values as the Seventh Amendment. Beyond this specific interest, Oregon and the other amici States share a broader concern. Defendants seek to limit the latitude traditionally accorded States to choose among fair procedures. They advance a notion of due process that, if accepted, would vest the federal courts with oversight authority to specify the procedures States must employ in their jury trials. The amici States have an interest in ensuring that they remain free to choose, consistent with principles of federalism, the procedures that will govern the relationship between judges and juries within their own jurisdictions.

SUMMARY OF ARGUMENT

This case turns on the degree to which the Constitution authorizes federal courts to oversee the procedures States employ in their jury trials. Defendants view the Due Process Clause as if it contained a template that every State's procedures must match. The Due Process Clause is not that restrictive, however.

It requires that States provide fair procedures but leaves the States latitude to decide which procedures or combination of procedures will ensure that juries assess punitive damages fairly.

Oregon limits the jury's discretion by directing it to base any award of punitive damages on specific statutory criteria and by requiring plaintiffs to meet a heightened burden of proof. That is sufficient. Procedural due process does not also require that Oregon courts review the jury's verdict to determine if it is excessive. Oregon's decision to provide limited judicial review reflects its respect for the integrity of jury verdicts, a decision that is consistent with the values reflected in the Seventh Amendment. States may provide different procedures to channel the jury's discretion, including more extensive review than Oregon courts undertake. But due process does not require that all States employ the same procedure.

ARGUMENT

Defendants' argument is limited. They do not argue that the damages awarded in this case are "so 'grossly excessive' as to violate the substantive component of the Due Process Clause," *TXO Production v. Alliance Resources*, 113 S. Ct. 2711, 2720 (1993) (plurality). Rather, they argue that procedural due process requires States to engage in judicial review to determine if damages awards are excessive as a matter of state law. Defendants and their amici take an unduly rigorous view of what due process entails. In no other area of the law has the Court suggested, much less held, that due process requires the sort of judicial review defendants propose. Indeed, if defendants' arguments were accepted, the Due Process Clause would require greater procedural protection when a jury awards punitive damages than when it imposes the death penalty. Nothing in

either the Court's decisions or a concern for due process supports that result.

Defendants' analysis goes astray in three respects. First, defendants focus their argument too narrowly. They ask whether a particular procedure is necessary without considering whether the other procedures a State provides ensure that any punitive damages award will be fair. Second, defendants undervalue Oregon's interest in the integrity of jury verdicts and overvalue the utility of "excessiveness" review. To the extent defendants' position results from their view of the common law, the common-law traditions in this area are more divergent than defendants' brief recognizes. *See Galloway v. United States*, 319 U.S. 372, 391–95 (1943). Third, defendants' arguments fail to recognize the principle that has guided the Court's due process analysis since *Spencer v. Texas*, 385 U.S. 554 (1967), and *McGautha v. California*, 402 U.S. 183 (1971). The Due Process Clause "requires that trials be fairly conducted," but it leaves the States latitude in deciding which procedures meet that standard. *McGautha v. California*, 402 U.S., at 220–21.

A. Oregon's Procedural Protections.

Oregon provides for limited judicial review of a jury's verdict. Oregon courts will inquire whether the evidence in record and any reasonable inferences that may be drawn from it support the verdict. *Schockey v. City of Portland*, 313 Or. 414, 422–23, 837 P.2d 505 (1992); *Foster v. Schnell Refrigeration Co.*, 280 Or. 411, 414, 571 P.2d 497 (1977). Oregon courts do not, however, second-guess the jury's verdict by trying to determine whether the verdict is against the weight of the evidence, nor do they undertake to determine whether the damages awarded are excessive. *Von Lom v. Schneiderman*, 187 Or. 89, 99, 210 P.2d 461 (1949). The respect for the integrity of

the jury's verdict, which is embodied in the Oregon Constitution, precludes the state courts from second-guessing the jury's factual findings. *See* Or. Const. Art. VII (Amended), § 3; *Von Lom v. Schneiderman*, 187 Or., at 99.[1]

Defendants focus on one procedure, which they term "excessiveness" review. They argue that Oregon's decision not to engage in "excessiveness" review denies them due process because the jury is left free to base its decision on bias or prejudice rather than the evidence. Defendants employ the wrong methodology, however. The Court has never held that post-verdict review for excessiveness is a necessary component of due process. *See Pacific Mutual Life Insurance v. Haslip*, 499 U.S. 1 (1991).[2] Nor has it looked solely at one part of the process a State provides to determine whether the State's procedures sufficiently limit the jury's discretion. *Id.*, at 18, 23 n. 11 (looking at cumulative effect of a State's procedures). Rather, it has based that determination on all the procedural protections that channel the jury's decision. *Ibid.*

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[1] Article VII (Amended), section 3, of the Oregon Constitution provides in part:

> In actions at law, where the value in controversy shall exceed $200, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.

[2] The Court recognized in *Haslip* that some procedure was necessary to counterbalance the discretion to impose punitive damages that Alabama juries were given. It concluded that the extensive post-verdict review the Alabama appellate courts undertook provided "a sufficiently definite and meaningful constraint on the discretion [allowed] Alabama factfinders in awarding punitive damages." 499 U.S., at 22. The Court did not hold that any other check would have been constitutionally insufficient.

The proposition is not a novel one. In death penalty cases, the Eighth Amendment requires that the jury not be allowed to exercise unfettered sentencing discretion.[3] *Furman v. Georgia*, 408 U.S. 238 (1972). No one procedure, however, is essential to channel or guide the jury's discretion. *Pulley v. Harris*, 465 U.S. 37, 42–46 (1984); *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (plurality). Rather, different procedures or combinations of procedures will suffice. *Ibid.* Indeed, the Court expressly rejected the notion that the sort of judicial review the Alabama Supreme Court provided in *Haslip* is necessary to limit the jury's sentencing discretion in death penalty cases. *Pulley v. Harris*, 465 U.S., at 450–51. It follows that the question in this case is not whether one procedure is absent but whether the cumulative procedures a State provides are sufficient to guide the jury's determination.

In punitive damages cases, Oregon provides a combination of procedures to ensure that any award of damages is not the product of bias or prejudice. The initial protection is voir dire. Both parties are permitted to engage in extensive questioning to identify prospective jurors whose bias would prevent them from deciding the case fairly. Or. R. Civ. P. 57C. Biased jurors may be excused for cause. Or. R. Civ. P. 57D(1); *see State v. Montez*, 309 Or. 564, 574–75, 789 P.2d 1352 (1990) (applying rule). Each party also has peremptory challenges that may be used to excuse jurors who are not biased but who, for one reason

[3] Due process, not the Eighth Amendment, applies to a punitive damages award in a civil case between private parties. *See Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). This brief discusses the Eighth Amendment requirements in death penalty cases only by way of comparison. It should be noted, however, that in death penalty cases, due process is less demanding than the Eighth Amendment. Giving the jury unfettered sentencing discretion in death penalty cases does not violate due process, *McGautha v. California*, 402 U.S., at 220–21, although it would violate the Eighth Amendment, *Furman v. Georgia*, *supra*.

or another, appear antagonistic to that party's case. Or. R. Civ. P. 57D(2).

A second protection is available to ensure that the jury's verdict will be based rationally on the evidence. Although counsel are allowed some latitude in argument, they may not engage in an argument that "ha[s] a tendency to excite the hostility of the jury against the opposing party." *Shaw v. Pacific Supply Coop.*, 166 Or. 508, 513, 113 P2d 627 (1941); *State of Oregon v. Montgomery Ward Development Corp.*, 79 Or. App. 457, 470, 719 P.2d 507, *review denied*, 301 Or. 667 (1986). The Oregon courts have made clear that, given a timely objection, trial courts should take whatever steps are necessary to cure appeals to jury prejudice or bias. *Ibid.* Oregon thus provides the parties with the means to ensure both that the jury is neutral and that the arguments presented are not aimed at inciting the jury.[4]

When a punitive damages case is submitted to the jury, Oregon provides two further protections. In products liability cases, such as this one, Oregon limits the jury's discretion by articulating criteria that both inform and limit its decision. *See* Or. Rev. Stat. § 30.925. The jury must find, as a threshold matter, that the defendant "has shown wanton disregard for the health, safety, and welfare of others." Or. Rev. Stat. § 30.925(1). If it crosses that threshold, then its decision to assess punitive damages "shall be determined and . . . based upon" the following criteria: (1) the likelihood that serious harm

[4] Although defendants speculate about possible jury bias against foreign or rich defendants, they have not claimed that their ability to detect such bias was unfairly limited during voir dire. *Cf. McCleskey v. Kemp*, 481 U.S. 279, 309–12 & n. 30 (1987) (statistical proof of general bias insufficient to invalidate specific verdict). Nor have they claimed that any argument plaintiffs made justified a mistrial or should have been cured by an appropriate instruction.

would result from the defendant's misconduct; (2) the degree to which the defendant was aware of that likelihood; (3) the profitability of defendant's misconduct; (4) the duration of the misconduct and any concealment of it; (5) the attitude and conduct of the defendant upon discovery of the misconduct; (6) the financial condition of the defendant; and (7) the "total deterrent effect" of other punishment imposed on the defendant as a result of the misconduct, including other punitive damages awards or criminal sanctions. Or. Rev. Stat. § 30.925(3)(a)–(g).

These criteria are virtually identical to the criteria the Alabama Supreme Court applied in its post-verdict review, which the Court held were constitutionally sufficient. *Compare* Or. Rev. Stat. § 30.925(3)(a)–(g), *with Pacific Mutual Life Insurance v. Haslip*, 499 U.S. at 21–22.[5] Although the criteria are essentially the same, they are introduced at different stages of the proceedings. Oregon courts instruct the jury to apply these criteria in determining the amount, if any, of punitive damages that should be awarded but do not review the jury's award for "excessiveness." Alabama conversely gives the jury substantial discretion in awarding punitive damages but reviews the jury award to determine, after the fact, whether it is consistent with the criteria.

If applying these criteria in post-verdict review provides a constitutionally sufficient constraint on the jury's discretion, as the Court held in *Haslip*, instructing the jury to apply them in

[5] The Court noted in *Haslip* that the Alabama courts considered (1) whether there is a reasonable relationship between the punitive damages awarded and the harm either actually done or likely to result from the defendant's conduct; (2) the degree of reprehensability of the defendant's conduct, its duration and degree of repetition, defendant's awareness of it, and any attempts to conceal it; (3) the profitability or expected profits from the conduct; (4) the defendant's financial position; (5) the costs of litigation; (6) imposition of criminal sanctions; and (7) the existence of other civil awards against the defendant. 499 U.S., at 21–22.

reaching its verdict is also constitutionally sufficient, if not preferable. Post-verdict review is necessarily speculative. A court must reason backwards from an unexplained verdict to divine whether the jury applied the correct standards. The inquiry is fraught with difficulties, a point the various opinions in this area have recognized. *See Pacific Mutual Life Insurance v. Haslip*, 499 U.S., at 18 (no mathematical line can be drawn distinguishing permissible from impermissible awards); *id.* at 37 (Scalia, J., concurring in the judgment); *TXO Production v. Alliance Resources*, 113 S. Ct., at 2720 (plurality) (plurality "skeptical" whether objective factors can be applied in a principled fashion); *id.*, at 2729 (O'Connor, J., dissenting) (recognizing inquiry is "no easy matter").

When, as in this case, the jury is instructed to apply the correct standards initially, post-hoc review for "excessiveness" becomes unnecessary.[6] As the Court repeatedly has recognized, juries are presumed to follow their instructions, and the only question is whether the jury was instructed properly. *See, e.g., Richardson v. Marsh*, 481 U.S. 200, 206 (1988); *Francis v. Franklin*, 471 U.S. 307, 325 n. 9 (1985); *Marshall v. Lonberger*, 459 U.S. 422, 438–39 n. 6 (1983). Certainly, as between post-hoc review of an unexplained verdict and directing the jury to follow instructions that focus and channel its discretion, the latter course would appear to lead to more consistent and rational jury awards.

Defendants advance two reasons why this limitation on the jury's discretion is, in their view, insufficient. Their initial argument is that juries cannot be trusted either to understand or

[6] It is worth repeating that although review for "excessiveness" of the award is not available in Oregon, both the trial court and the appellate courts may test any award to ensure that the evidence supports the jury's verdict.

to follow their instructions. (Pet. Br. at 31–32). Not only is defendants' view apparently inconsistent with the position they took below,[7] but as noted above it is contrary to a long line of this Court's cases. The Court has repeatedly recognized that juries can and will follow their instructions even when, for example, the instructions call on them to engage in particularly difficult deliberative tasks, *e.g.*, to consider prejudicial evidence for one purpose but not another. *See, e.g., Spencer v. Texas*, 385 U.S., at 567–68; *McGautha v. California*, 402 U.S., at 220–21; *Marshall v. Lonberger*, 459 U.S., at 438–39 n. 6. If juries can follow the court's instructions not to consider evidence of a defendant's past convictions in deciding whether he or she is guilty of the present crime, *see ibid.*, they are also capable of applying Oregon's statutory criteria in determining what amount of punitive damages, if any, should be assessed.

Defendants advance an additional concern. They say that the "instructions actually given" were insufficient. (Pet. Br. 32–33). It is unclear whether defendants are quarrelling with the specific instructions the trial court gave in this case or arguing that sufficient instructions can never be given. If defendants are advancing the former proposition, it is a case-specific dispute that they apparently gave up below.[8] To the extent they are arguing that multi-factor approaches are inherently insufficient, the Court has not accepted that claim in other contexts. For example, in the death penalty cases, the Court initially recognized that requiring juries to weigh aggravating factors against mitigating factors

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[7] The Oregon Supreme Court noted that "[d]efendants do not claim that the trial court failed to instruct the jury concerning the statutory criteria or that the jury did not properly apply those criteria." *Oberg v. Honda Motor Co.*, 316 Or. 263, 282 n. 11, 851 P.2d 1084 (1993).

[8] *See* note 7 *supra*.

sufficiently channels jury discretion under a more demanding Eighth Amendment standard. *See Gregg v. Georgia*, 428 U.S., at 193–95; *Proffitt v. Florida*, 428 U.S. 242, 257–58 (1976) (directing jury to weigh statutorily defined aggravating and mitigating factors sufficiently limited their sentencing discretion).[9] If instructing the jury in a death penalty case to base its sentence on statutorily defined aggravating and mitigating circumstances sufficiently limits the jury's discretion, so does instructing the jury to base any punitive damages award on the criteria set out in the Oregon statutes. *Pulley v. Harris*, 465 U.S., at 44–51.

Oregon also provides an additional procedural protection in punitive damages cases in the form of a heightened burden of proof. Under Oregon law, "a claim for punitive damages shall be established by clear and convincing evidence." Or. Rev. Stat. § 41.315(1). Due process does not require that punitive damages be proved by anything more than a preponderance of the evidence. *Pacific Mutual Life Insurance v. Haslip*, 499 U.S., at 23 n. 11. As the Court recognized in *Haslip*, however, that "[t]here is much to be said in favor of a State's requiring . . . a standard of 'clear and convincing evidence'. . . ." *Ibid.* Oregon requires that standard of proof, thus minimizing the possibility that a jury will impose an unwarranted punitive damages award.

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[9] The Court later made clear that the Eighth Amendment does not require States to direct the jury to weigh aggravating and mitigating circumstances. *See Zant v. Stephens*, 462 U.S. 862 (1983). It requires only that States narrow the class of persons on whom the death penalty may be imposed. *Id.*, at 867. Even then, the Eighth Amendment imposes greater constraints on the jury's exercise of discretion in death penalty cases than the Due Process Clause. *See McGautha v. California*, 402 U.S., at 220–21 (due process does not prohibit jurors from being given unfettered discretion in death penalty cases).

In short, because defendants focus too narrowly on the absence of "excessiveness" review in Oregon, they fail to recognize that that review would be constitutionally redundant in light of the other protections Oregon provides.

B. Excessiveness Review.

Even if the absence of "excessiveness" review were the appropriate focus, defendants' argument is still troubling. It undervalues the State's interest in jury verdicts and overvalues the degree to which "excessiveness" review would advance the fairness of the jury's determination.

Oregon's interest is clear. Article VII (Amended), section 3, of the Oregon Constitution protects the integrity of jury verdicts. It prohibits state courts from re-examining facts found by the jury except to determine whether the verdict is supported by the evidence. The value Oregon places on jury verdicts is not unique. The Seventh Amendment protects the same values, and in almost identical terms. The Seventh Amendment provides that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."[10] The only difference between the state and federal constitutional provisions is that the federal provision has a broader exception than the state. It permits the federal courts to re-examine the jury's factual findings "according to the rules of the common law." It would, for example, permit remittitur when the state constitution would not. *Compare Dimick v. Schiedt*, 293 U.S. 474, 484–85 (1935) (remittitur permissible under the Seventh Amendment), *with Oberg v. Honda Motor Co.*, 316 Or.,

[10] The Oregon Constitution provides: "no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict." Art. VII (Amended), § 3.

at 275 n. 7 (re-examining jury's award of punitive damages impermissible under Art. VII (Amended), § 3).

Although the Seventh Amendment permits federal courts to determine whether a damages award is excessive, it does not follow that the Due Process Clause requires state courts to do so. To the contrary, it would seem somewhat odd for due process to require States to do what the Seventh Amendment merely permits. Defendants, however, claim that the common law embodies the conclusion that "excessiveness" review is necessary to prevent the jury from basing its verdicts on passion or prejudice. It follows, they conclude, that Oregon's departure from the common law is both "aberrant" and unconstitutional.

Part of the difficulty with defendants' argument is that the relationship between the judge and the jury at common law varied widely. As this Court has explained, when the Seventh Amendment was adopted, "'the rules of the common law' then prevalent, including those relating to the procedure by which the judge regulated the jury's role on questions of fact, [were not] crystallized in a fixed and immutable system." *Galloway v. United States*, 319 U.S. 372, 391 (1943); *see* Edith G. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 291 (1966).[11] Rather, those rules were "constantly changing and developing" "result[ing] in widely divergent common-law rules on procedural matters among the

[11] When the Seventh Amendment was adopted, no "implicit understanding as to th[e] relationship [between judge and jury can] be presumed, for among the thirteen original states there were at least half a dozen widely differing patterns of civil practice. . . ." Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV., at 291.

states, and between them and England." *Galloway v. United States*, 319 U.S., at 391-92.[12]

The Seventh Amendment thus does not embody any particular incident of the common law practice. *Colgrove v. Battin*, 413 U.S. 149, 155-57 (1973); *Galloway v. United States*, 319 U.S., at 394-95. It does not restrict the federal government to a particular number of jurors or to a particular relationship between the judge and the jury. *Ibid.* If the Seventh Amendment gives Congress and the federal courts some leeway to decide what mode of judicial review is appropriate, there is no reason to suppose that the Due Process Clause imposes a more stringent limitation on the States. Rather, like the Seventh Amendment, the Due Process Clause leaves the States free, consistent with the historical value placed on jury verdicts, to conclude that re-examination of the jury's verdict should be limited.

Not only is Oregon's decision to limit judicial review of jury verdicts consistent with long held and widely shared values, but the review defendants claim is constitutionally required seems singularly unhelpful. As discussed above, the procedure defendants advocate — reasoning backwards from an unexplained verdict to determine whether the jury's damages award was based on permissible or impermissible factors — is an imprecise science at best. It fails to provide any sure protection to defendants, and

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[12] In *Galloway*, the Court considered whether the Seventh Amendment, which permits federal courts to re-examine the jury's factual findings "according to the rules of the common law," allowed them to direct jury verdicts in civil cases. It concluded that the common-law rules were sufficiently varied and changing that the constitutional phrase was not intended to embody any particular incident of the common-law practice. The same point applies equally here, even though some common-law courts allowed new trials when the verdict was against the weight of the evidence. *See* Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV., at 318-20 (summarizing practice in the colonies).

it enmeshes the courts in an inquiry that lacks any principled guidelines.

The review defendants seek also duplicates in substantial part a protection they already apparently enjoy. To explain why that is so, it is necessary to discuss briefly the opinions in *TXO Production v. Alliance Resources*, *supra*, and the narrow issue defendants have raised. A majority of the Court agreed in *TXO* that the Due Process Clause imposes a substantive limit on punitive damages awards, although they disagreed on precisely what that limit was. *See TXO Production v. Alliance Resources*, 113 S. Ct., at 2720 (plurality) (considering whether award was "so 'grossly excessive' as to violate the substantive component of the Due Process Clause"); *id.*, at 2731 (O'Connor, J., dissenting) (noting "common ground [between the plurality and the dissent] than an award may be so excessive as to violate due process"). If *TXO* requires, as a matter of substantive due process, that punitive damages awards not be "grossly excessive," Oregon courts will be required to make that substantive federal inquiry in future cases, if and when the claim is made that a particular award exceeds that limit. *See Felder v. Casey*, 487 U.S. 131 (1988); *Rogers v. Saylor*, 306 Or. 257, 760 P.2d 232 (1988).

In this case, defendants have not argued that the award at issue here is so excessive that it violates substantive due process. They made that point clear in their reply to plaintiff's brief in opposition to the petition for certiorari. They explained: "Honda is not pressing a substantive due process argument in this Court; rather, the contention is that the denial of any excessiveness review in the Oregon courts deprived Honda of *procedural* protections to which it is entitled." (Reply Br. at 2) (emphasis in original). Defendants apparently take the view that procedural due process requires state courts to determine if a punitive

damages award is "excessive" as a matter of state law, separately from the determination whether it is excessive as a matter of federal law.

The inquiry defendants seek to impose on state courts does not advance any cognizable federal interest. If *TXO* already requires state courts to decide whether a punitive damages award is so excessive that it violates substantive due process, there is no point in requiring them to make a comparable determination as a matter of state law. To the extent the state and federal "excessiveness" inquiries are identical, *see TXO Production v. Alliance Resources*, 113 S. Ct. at 2726 n. 1 (Scalia, J., concurring in the judgment), the state inquiry will add nothing to the analysis. To the extent state law imposes a stricter limit on punitive damages than federal law would, *see id.*, at 2720 n. 24 (plurality),[13] the inquiry defendants would require will result in the States' invalidating punitive damages awards that do not violate substantive federal standards. Defendants would be effectively asking the Court to impose a stricter substantive standard, in the name of procedural protection, than the substantive component of the Due Process Clause requires. That argument impermissibly converts a procedural protection into a substantive one.

C. Deference to State Legislative Judgments.

Defendants' argument suffers from a final flaw. It invites the Court to impose, as a matter of due process, what they contend is a better procedure. The Court, however, has customarily given the States considerable latitude to determine what procedures are appropriate. As Justice Harlan explained in *McGautha v. Califor-*

[13] The plurality in *TXO* recognized that a punitive damages award might be "excessive" in violation of state law but not "so 'grossly excessive'" that it violates substantive due process. *TXO Production v. Alliance Resources*, 113 S.Ct., at 2720 n. 24.

nia, 402 U.S., at 221, due process "requires no more than that trials be fairly conducted . . . ." As long as a State's procedures are fair, due process does not require States to adopt procedures that may provide a "superior means" of dealing with the issue. *Ibid.* In part, that deference results from notions of federalism. In part, it results from the recognition that many of the debates over procedure in fact reflect substantive policy disputes that are more properly left to the legislative branch.

Tort reform is no exception. The debate whether punitive damages should be limited or abolished has been vigorous. State legislatures have responded with both substantive and procedural limitations. Some States have capped punitive damages awards.[14] Others have bifurcated the liability and damages phase of the hearing or required the trial court to assess punitive damages once the jury determines they are appropriate.[15] Still others prohibit evidence of a defendant's financial condition from being introduced until after the jury has determined that the

[14] *See* Ala. Code § 6-11-21 (Supp. 1992); Colo. Rev. Stat. Ann. § 13-21-102(1)(a) (West 1989); Conn. Gen. Stat. Ann. § 52-240b (West 1991); Fla. Stat. Ann. § 768.73(1)(a) (West Supp. 1993); Ga. Code Ann. § 51-12-5.1(g) (Supp. 1992); Kan. Stat. Ann. §§ 60-370(e), 60-3402 (Supp. 1992); Nev. Rev. Stat. Ann. § 42.005(1) (Michie Supp. 1991); Okla. Stat. Ann. tit. 23, § 9 (West 1987); Tex. Civ. Prac. & Rem. Code Ann. § 41.007 (Vernon Supp. 1993); Va. Code Ann. §§ 8.01-38.1 (Michie 1992).

[15] *See* Cal. Civ. Code Ann. § 3295(d) (West Supp. 1993); Conn. Gen. Stat. Ann. § 52-240b (West 1991); Ga. Code Ann. § 51-12-5.1(d)(2) (Michie Supp. 1992); Kan. Stat. Ann. §§ 60-3702, 60-3402 (Supp 1992); Minn. Stat. Ann. § 549.20(4) (West Supp. 1993); Mo. Ann. Stat. § 510.263 (West Supp. 1992); Mont. Code Ann. § 27-1-221(7) (1991); Nev. Rev. Stat. Ann. § 42.005(3) (Michie Supp. 1991); N.D. Cent. Code § 32-03.2-12 (Supp. 1991); N.J. Rev. Stat. Ann. § 2A:58C-5 (West 1987); Ohio Rev. Code Ann. § 2315.21(C)(2) (Anderson 1991).

defendant should be assessed some punitive damages.[16] Some have adopted heightened standards of proof and other procedures.[17]

The point is not that one side or the other has won the day legislatively. Rather, both sides have been able to present their positions in the state legislatures, and courts should be hesitant to override the policy choices that result from that legislative process. As long as a State provides fair procedures — and Oregon does — deference to the legislative judgment embodied in state statutes and constitutional provisions should continue to counsel against engrafting additional procedures on state practice. Defendants' invitation to do so should be declined.

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[16] *See* Cal. Civ. Code Ann. § 3295(d) (West Supp. 1993); Md. Code Ann. § 10-913(a) (1989); Mont. Code Ann. § 27-1-221(7) (1991); Nev. Rev. Stat. § 42.005(4) (Supp. 1991); N.J. Stat. Ann. § 2A:58C-5(a) (West 1987); Or. Rev. Stat. § 30.925(2); Utah Code Ann. § 78-18-1(2) (Michie 1992).

[17] Alaska Stat. § 09.17.020 (1992); Ala. Code § 6-11-20(a) (Supp. 1992); Cal. Civ. Code Ann. § 3294(a) (West Supp. 1993); Colo. Rev. Stat. Ann. § 13-25-127(2) (West 1989); Fla. Stat. Ann. §§ 768.73 - 768.74 (West Supp. 1993); Ga. Code Ann. § 51-12-5.1(b) (Michie 1992); Ind. Stat. Ann. § 34-4-34-2 (Burns 1986); Iowa Code. Ann. § 668A.1 (West 1987); Kan. Stat. Ann. § 60-3701(c) (Supp. 1992); Ky. Rev. Stat. § 411.184(2) (Michie 1992); Minn. Stat. Ann. § 549.20(1) (West Supp. 1993); Mont. Code Ann. § 27-1-22(5) (1991); Nev. Rev. Stat. Ann. § 42.005(1) (Michie Supp. 1991); N.D. Cent. Code § 32-03.2-12 (Supp. 1991); Ohio Rev. Code Ann. § 2315.21(C)(3) (Anderson 1991); 1986 Okla. Sess. Laws 315 § 1; Or. Rev. Stat. § 41.315(1) (1991); S.C. Code Ann. § 15.33-135 Ann. § 78-18-1(1)(a) (Michie 1992).

CONCLUSION

For the reasons stated above, the Oregon Supreme Court's judgment should be affirmed.

Respectfully submitted,

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No. 93-644

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

HONDA MOTOR CO., LTD; HONDA R&D CO., LTD; AND AMERICAN HONDA MOTOR CO. INC.,
Petitioners,

v.

KARL L. OBERG,
Respondent.

On Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF OF AMICUS CURIAE TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

Trial Lawyers for Public Justice, P.C. ("TLPJ"), is a national public interest law firm devoted to representing victims of corporate and government abuse. TLPJ has pioneered cases in environmental protection, civil liberties, consumer safety, and employee protection. Supported by more than 1,300 trial lawyers throughout the United States, TLPJ is the only public interest law firm in the nation dedicated to using plaintiffs' tort law and trial law for the public good.

TLPJ strives to achieve social change and vindicate individual rights by ensuring that victims are compensated for their injuries and that wrongdoers are punished for their misconduct. Punitive damages are a vital weapon in TLPJ's campaign for justice. Accordingly, TLPJ respectfully submits this brief in support of the respondent in this case.[1]

SUMMARY OF ARGUMENT

In addition to advancing legal and historical arguments that procedural due process mandates weight-of-evidence review in every case and state, Honda and its *amici* go to considerable lengths to "empirically" prove that such a review is essential to control runaway jury verdicts. We are filing this brief *amicus curiae* to address those "empirical" arguments.

The "empirical" arguments proffered by Honda and its *amici* are used to advance three claims: *(a)* that, outside of Oregon, weight-of-the-evidence excessiveness review is both "routinely" available and remarkably effective; *(b)* that this panacea needs to be prescribed *in Oregon* because of the assertedly ever-worsening *national* crisis of skyrocketing punitive damages awards; and *(c)* that defendants need this type of judicial review because lay jurors are incompetent, or biased, or

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[1] Pursuant to Rule 37 of the Rules of this Court, TLPJ has obtained the consent of the parties to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

both, and because there is no other procedural device that is capable of constraining the passions and prejudices of capricious juries.

We demonstrate below that the "empirical" arguments provided in support of these claims are empirical in name only, as they are based on questionable pseudo-scientific myths rather than documented scientific facts. In brief, there are four reasons why.

FIRST, Honda's own unvalidated study of remittitur practice, which was devised solely for argument in this Court, is too flawed to yield useful data and worthwhile inferences -- flawed by the fact that the two-year period picked by Honda for its compilation of "sample" data is both too short and too recent to generate serviceable data; flawed by the fact that Honda has misread and mischaracterized a significant proportion of the cases that it found in its "sample;" and flawed by the fact that the inferences drawn by Honda from the "data" found in its "sample" are based on an unstated, unexamined, and unsuitable premise -- that, because some states have found weight-of-the-evidence excessiveness review to be helpful, all states are constitutionally required to have it.

SECOND, in contrast to Honda's unvalidated study, the data compiled in a well-validated 25-year empirical study of punitive damages awarded in the United States in products liability cases -- cases like the one at bar -- show that Oregon has no need for the procedural reform that Honda insists it must have. That study, which has been widely extolled by commentators and has been cited as authority by a number of courts, and which even Honda lauds as authentic, establishes that: *(a)* punitive damages are rarely awarded in products liability actions in Oregon (only twice in 25 years, including the instant case); *(b)* the size of the mean punitive damages award in Oregon is less than one-half the national mean; *(c)* although during the 25-year period covered an average of 1.16% of the nation's population lived in Oregon, Oregon juries awarded less than one-quarter of that percentage in punitive damages during that time period; *(d)* of the 44 other states that allow punitive damages awards, Oregon ranks in the bottom half in both total awards and per capita awards; and *(e)* the amount of punitive

damages awarded per capita in Oregon is less than one-quarter of the amount awarded nationwide.

In sum, this validated data, far from showing that judicial post-verdict weight-of-the-evidence excessiveness review provides more protection than Oregon's structure of pre-verdict and post-verdict protections, demonstrate that the Oregon regime produces better results for defendants. For this reason, Oregon should not be compelled to conform to the procedures observed in other states in order to "protect" defendants.

THIRD, contrary to the "facts" variously proclaimed by Honda and its *amici* about a national epidemic of skyrocketing punitive damages awards, ***"every empirical study of the [punitive damages] question has reached conclusions that, to say the least, fail to support" the claim that "punitive damages have grown dramatically in both frequency and size."*** Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System--and Why Not?"* 140 U. Pa. L. Rev. 1147, 1254 (1992).

FOURTH, contrary to Honda's claim that "[t]he empirical evidence is overwhelming that juries often" are inept, irrational, and/or biased, Pet. Br. at 10, the most recent and most reliable studies of jury performance demonstrate that: *(a)* jurors serve conscientiously and proficiently; *(b)* they perform as well, if not better, than judges in finding facts and setting awards; and *(c)* jurors in tort cases are biased, if at all, against plaintiffs and in favor of defendants, particularly corporate defendants. Thus, ***"aggregate empirical evidence drawn from multiple sources lends no support to claims that juries are consistently pro-plaintiff, incompetent, or deliver unjustifiably generous awards."*** Neil Vidmar, *The Unfair Criticism of Medical Malpractice Juries*, Judicature (Oct-Nov. 1992) 118, 124.

Each of these points is discussed in detail below.

ARGUMENT

I. CONTRARY TO HONDA'S ASSERTION, "EMPIRICAL DATA" DOES NOT DEMONSTRATE THAT JUDICIAL POST-VERDICT, WEIGHT-OF-THE-EVIDENCE EXCESSIVENESS REVIEW IS NEEDED IN OREGON TO CONTROL PUNITIVE DAMAGES AWARDS.

Honda says that "[c]ommon sense . . . suggests that jurors will make errors in setting damages awards." Pet. Br. at 26. Honda further asserts that common sense is confirmed by "empirical data." *Id.* Thus, Honda boasts that it "has reviewed all reported cases, state and federal," 271 in total, "in which punitive damages were contested as excessive during 1992 and 1993," *id.* at 27 (footnote omitted), and that the "empirical data" extracted from this review "demonstrate that trial and appellate judges frequently find it necessary to reduce or remit damages awarded by juries." *Id.* at 26. Honda additionally asserts that "it is simply indisputable that a very substantial percentage of punitive jury awards are excessive and thus legally erroneous." *Id.* at 29. Finally, Honda concludes that the procedural remedy that has proved so serviceable in other states – remittitur – is "no less necessary in Oregon." *Id.* at 30.

Honda's "common sense" argument, and the "empirical data" amassed in support of that argument, are flawed in three major respects.

First, although Honda says that its "empirical data" proves that untrained jurors are prone to error and cannot be trusted with verdicts, all that that data really shows is that Honda's highly-trained lawyers are prone to error and cannot be trusted with computers. Even a cursory review of the 61 federal cases listed in Appendices A and B of Petitioners' Brief reveals that Honda has completely misread, misportrayed, and miscategorized at least 13 of those cases (21.3%). And Honda's errors are not trivial ones.

For example, Honda asserts that the "punitive damages" awarded in *Hygh v. Jacobs*, 961 F.2d 359 (2d Cir. 1992), "were held not excessive." Pet. Br. at 5a. Although the Second

Circuit's opinion actually contained the words "excessive" and "punitive" – trigger words that Honda used in its computerized database search for cases (*see* Pet. Br. at 27 n. 19, describing the methods Honda used "[t]o construct our sample") – those trigger words obviously were used by the parties and the court in ways that Honda did not quite expect.

Thus, *Hygh* involved an appeal by a police officer who had been held liable for civil rights violations under 42 U.S.C. § 1983 for *"excessive use of force"* against a civilian. 961 F.2d at 361. The issues on appeal concerned a large *compensatory damage* award, and had nothing to do with the minuscule punitive damages that had been awarded in that case. Only the $281,000 compensatory damages award was challenged as being against the weight of the evidence, not the $1,000 punitive damages award.

Honda made a similar error with regard to *Hafner v. Brown*, 983 F.2d 570 (4th Cir. 1992). As was the case with its classification of *Hygh*, Honda says the "punitive damages" awarded in *Hafner* "were held not excessive." Pet. Br. at 5a. Once again, however, excessiveness entered the picture not as an asserted ground for remittitur or appeal, but as the basis for liability; in *Hafner*, as in *Hygh*, police officers were sued under 42 U.S.C. § 1983 for *excessive use of force*. And, in *Hafner*, as in *Hygh*, the size of the punitive damages award was not at issue; instead, the appellants asserted that the trial judge had committed error in providing supplemental instructions to the jury in the midst of its deliberations. 983 F.2d at 574-75.

Honda got a little closer to the mark in *Loughman v. Consol-Pennsylvania Coal, Co.*, 6 F.3d 88 (3d Cir. 1993), but not much. At least, *Loughman* involved punitive damages. Still, nothing relating to the size of that award entered into the court's consideration of that case. Instead, the punitive damages question at issue revolved around the *plaintiffs' "contenf tion]* that the district court erred in refusing to assess punitive damages jointly and severally among the defendants." 6 F.3d at 100 (emphasis added).

Honda stumbled yet again in its attempt to pigeon-hole *Stephens, Inc. v. Geldermann, Inc.*, 962 F.2d 808 (8th Cir.

1992). According to Honda, that case also implicated a challenge to jury excessiveness. In fact, however, the relevant issue on appeal was whether the evidence submitted to the jury was sufficient to support *any* award of punitive damages. As the Eighth Circuit carefully and clearly explained, ***defendant "concedes that the essential basis of its trial objection and post-trial motion for remittitur was that the issue of punitive damages should not have been presented to the jury, not that the jury's award was excessive assuming punitive damages were justified."*** 962 F.2d at 815 (emphasis added). It appears that Honda did not read this case, the cases listed above, and many other cases in its sample with great care.[2]

To be sure, an occassional oversight or an infrequent inaccuracy is hardly cause for concern. But the mistakes made by Honda are neither few nor inconsequential. For this reason, whatever else might be said about Honda's "empirical data," these errors contaminate Honda's evidence and thereby render suspect Honda's entire "study."

Second, Honda's methodologies are as flawed as its characterizations of so many cases. Honda's most glaring and most fundamental methodological mistake lies in the short two-year time-period selected for study. Without a longer time-span, the ultimate resolution of the cases Honda cites is unknown and unknowable. For example, it cannot be determined whether remitted awards are upheld on appeal or not.[3] In addition, a

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[2] *See* Appendix A hereto for other cases that were mistakenly characterized by Honda.

[3] Such a brief period cannot capture the complexity of judicial modification of jury awards. It is not uncommon for remitted awards to be reinstated, vacated or reversed entirely. For example, in *Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451 (1985), *cert. denied*, 476 U.S. 1104 (1986), the punitive damages award was handed down by an Oklahoma jury in 1979, reversed by the 10th Circuit, and remanded to the appeals court by the U.S. Supreme Court in 1984. In 1985, the Tenth Circuit reversed and remanded the punitive damages award. The case was finally settled in 1986, shortly after the Court denied a petition for writ of *certiorari*. If Honda's single-point-in-time examination had been applied to *Silkwood*, any number of false

single-point-in-time analysis is particularly vulnerable to distortion if the period examined has been deliberately chosen to make a partisan point. In this case, whatever Honda's motive, its focus on the past years undeniably skewed its results: the instant case was decided by the Oregon Supreme Court in 1993, and 1992 was the year that the Ninth Circuit upheld *Ingram v. Acands, Inc., supra* – the only other products liability case in the last 28 years in which punitive damages were awarded in a case involving Oregon law. In contrast to Honda's two-year "snapshot," each of the five major empirical studies of punitive damages covered longer periods of time. *See* Section II, *infra* (discussing the periods surveyed and findings made in these five studies). Finally, Honda's sample, and thus its study, is flawed in yet another respect because the sample, small as it is, consists of a grab-bag of cases, completely undifferentiated as to the type of action involved.[4]

Third, and most importantly, even if the cases in Honda's sample represented what Honda says they do, and even if the validity of Honda's study was not vitiated by its

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conclusions could have been drawn as to whether error was made and as to who committed the error.

[4] By mingling the instant case and two other products liability actions in which punitive damages awards were reduced as excessive (*Ross v. Black & Decker*, 977 F.2d 1178 (7th Cir. 1992) and *General Motors Corp. v. Johnston*, 592 So.2d 1054 (Ala. 1992)) with such disparate cases as those involving a customer's claims of sexual assault and battery and false imprisonment against a restaurant chain, *Big B., Inc. v. Cottingham*, 1993 WL 341132 (Ala. 1993), a niece's claim of sexual abuse against an uncle, *Herald v. Hood*, 1993 Ohio App. LEXIS 3688 (Ohio Ct. App. 1993), and a claim of trespass by one neighbor against another for cutting down trees without permission, *Simerly v. Edwards*, 1992 Tenn. App. LEXIS 312 (Tenn. Ct. App. 1993), Honda mixes not only apples and oranges but every other item in the food chain. Some types of cases might enkindle more passion and prejudice; other types might ignite less. For present purposes, however, the key word is the conjectural "might." In the absence of a careful analysis of these cases, and others drawn from a larger universe and a longer period of time, it is impossible to ascribe any meaning to, or repose any confidence in, the data teased from these cases by Honda.

numerous methodological mistakes, Honda's data still would not prove its conclusion. Thus, the most fundamental flaw in Honda's argument is not a factual or methodological one, but a logical one: the assertion that because a certain procedure is available by popular choice in most states, it should be made available by constitutional fiat in every other state.

In Honda's syllogism, the unstated and unexamined premise is that because some states have determined that remittiturs are useful, remittiturs must be necessary in every state, specifically in the State of Oregon, and that, therefore, remittiturs should be required to be provided nationwide. Thus, Honda insists that this Court should transform what is a jurisprudential policy preference in some states into a constitutionally compelled requirement in every state.

Honda's effort to bolster its reasoning with "empirical" data -- "we have statistics that prove that everybody's doing it" -- adds nothing to the merit of its argument. Most pertinently, Honda never bothers to ask whether Oregon has a problem with jury awards of punitive damages: whether, for example, Oregon juries award punitive damages too frequently; or routinely make awards that are excessive in size; or commonly render punitive damages in amounts that are way outside the mainstream of awards rendered in other states.

Because Honda never asks the right questions, its "empirical data" is useless in providing the right answers. Nevertheless, there is one empirical study that readily lends itself to the essential inter-state comparisons: Michael Rustad and Thomas Koenig, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1 (1992) ("Rustad-Koenig Study"). Professors Rustad[5] and Koenig examined data regarding every products liability case filed anywhere in the United States during the 25-year period from 1965 through 1990 that resulted in a punitive damages award. *See* Rustad-Koenig Study, 78 Iowa L. Rev. at 32-36. Unlike Honda's study, which was prepared solely for argument in this Court, the Rustad-Koenig Study has been validated by the

[5] Prof. Rustad is co-counsel on this brief.

peer-review process and has been hailed as comprehensive and authoritative by courts and academic commentators alike.[6]

As reflected in the accompanying graphs, and in the underlying tables, that are attached hereto as Appendix B, the Rustad-Koenig Study yields a number of significant findings:

[6] The Rustad-Koenig research has been praised by many academics as consistent with other serious scholarly studies on the incidence and size of punitive damage awards in products liability cases. *See, e.g.*, Michael Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System and Why Not?*, 140 U. Pa. L. Rev. 1147, 1259 (1992) (Rustad-Koenig study is the "most intensive examination of punitive damages in product liability cases"); Dean Teresa Schwartz, *Punitive Damages and Regulated Products*, 42 Am. U. L. Rev. 1335,1348, 1352 (1993) (citing findings on medical products cases with approval); Marc Galanter and David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 Am. U.L. Rev. 1393, 1409 (1993) ("Rustad and Koenig study was exhaustive search for punitive damage awards in product liability cases in both state and federal courts"); Jerry Phillips, *Comments on the Reporters' Study of Enterprise Responsibility for Personal Injury*, 30 San Diego L. Rev. 241, 248 (1993) (concluding that Rustad study consistent with other empirical research); Kenneth Abraham, Robert Rabin, & Paul Weiler, *Enterprise Liability for Personal Injury: Further Reflections*, 30 San Diego L. Rev. 333, 344 (1993) (Reporters for ALI Project on Enterprise Liability citing Rustad-Koenig Study for proposition that "punitive damage awards are an exceptional event.").

Several courts have also cited the Rustad-Koenig study as definitive. *See, e.g., Dunn v. Hovic*, 1 F.3d 1371, 1388 (3rd Cir. 1993) (*en banc*) ("exhaustive search" of punitive damages awards in products liability cases, with results consistent with other empirical studies); *Burke v. Deere & Co.*, 6 F.3d 497, 516 (1993) (Heaney, J., dissenting) (Rustad-Koenig Study "debunks" myth of "runaway juries," "skyrocketing awards," and "competitive disadvantage"). *See also Transportation Insurance Co. v. Carlos*, 1994 Tex. Lexis 23 (Tex. Feb. 2, 1994) (concurring and dissenting opinions citing Rustad-Koenig study).

(A) Punitive damages are rarely awarded in products liability actions in Oregon (only twice in 25 years, including the instant case).[7]

(B) The size of the average punitive damages award in Oregon is less than one-half the size than the national mean (only 46.12% of national mean).

(C) Although during the 25-year period covered an average of 1.16% of the nation's population lived in Oregon, juries in that state awarded less than one-quarter of that percentage in punitive damages during the 25 years surveyed, that is, only 0.27% of the total punitive damages awarded nationwide in products liability cases from 1965 through 1990 (less than one-quarter of the expected rate).

(D) Of the 45 states that allow punitive damages awards, Oregon ranks in the bottom one-half in both total awards (ranking 29th) and per capita awards (ranking 24th).

(E) The amount of punitive damages awarded per capita in Oregon is less than one-quarter of the amount awarded nationwide ($1.47 per capita in Oregon for the 25-year period surveyed and only $0.06 per capita per year, compared to $6.36 per capita for the United States for the same 25-year period or $0.25 per capita per year nationwide).

Thus, contrary to Honda's claim that defendants in Oregon fare worse than defendants in states that provide for remittiturs, **defendants in Oregon actually fare *better* than defendants in most other states.** Put differently, data derived from the Rustad-Koenig Study make plain that Oregon's panoply

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[7] During the period from 1965 through 1990, punitive damages were awarded only twice in cases involving Oregon law: once in the instant case, and a second time in *Ingram v. Acands, Inc.*, 977 F. 2d 1332 (9th Cir. 1992). Moreover, punitive damages have not been awarded in a products liability trial in Oregon since 1990.

of procedural protections provides results superior (from the defendant's perspective) to those obtained through the remittitur practices afforded in other states. Thus, defendants in Oregon have no rational reason to covet the safeguards offered in other states. More importantly, there is no reason for this Court to impose a procedural requirement on Oregon that Oregon does not want and does not need.

II. CONTRARY TO HONDA'S CLAIMS, AND THOSE OF SOME OF ITS *AMICI*, THERE IS NO *NATIONWIDE* PUNITIVE DAMAGES CRISIS.

Unable empirically to establish that there is a crying need *in Oregon* for the procedural punitive damages "reform" they seek to have imposed on that state, Honda and a few of its *amici* nonetheless maintain that this Court should require such reform on the basis of a supposedly ever-worsening punitive damages crisis *throughout the rest of the nation*. Significantly, however, with the exception of two distorted renderings of a single 1987 study, Honda and its *amici* do not even attempt to build an empirical case in support of their claims. Rather, without providing any hard data, Honda beseeches the Court to provide post-verdict weight-of-the-evidence excessiveness review because "in today's litigation climate the *amount* of money involved can be staggering: the size of a [punitive] damages award is limited only by the jury's (or, as in this case, the plaintiff's) imagination, and seven-, eight-, and even nine-figure judgments are now common . . . ." Pet. Br. at 20 (footnote omitted; emphasis in the original). Similarly, the Brief *Amici Curiae* of the Products Liability Advisory Council, *et al.* ("PLAC Br.") insists that weight-of-the-evidence review is desperately needed because "commercial entities [in the United States] have suffered directly from the *surge of arbitrary, discriminatory, and excessive punitive damages judgments in recent years.*" PLAC Br. at 2 (emphasis added). In like fashion, the Brief *Amicus Curiae* of the Equal Employment Advisory Council ("EEAC Br.") complains that *"[p]unitive damages awards, particularly in the business context, are increasing by leaps and bounds."*

EEAC Br. at 15 (emphasis added). *See also* Brief *Amici Curiae* American Council of Life Insurance, *et al.* ("ACLI Br.") at 7; PLAC Br. at 18 n.2; and EEAC Br. at 11.

Tellingly, Honda and its *amici* have been able to find only a single empirical study to cite in support of their contention that there is an ever-worsening national punitive damages crisis: Mark Peterson, Syam Sharma, and Michael Shanley, *Punitive Damages: Empirical Findings*, RAND-Institute for Civil Justice Report, R-3311-ICJ (1987) ("RAND-ICJ Study").[8] This paucity of support is not surprising in view of the fact that ***"every empirical study of the [punitive damages] question has reached conclusions that, to say the least, fail to support" the claim that "punitive damages have grown dramatically in both frequency and size."*** Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System--and Why Not?"* 140 U. Pa. L. Rev. 1147, 1254 (1992).

What is worse, though, at least from the perspective of the petitioners' interests, is the fact that the RAND-ICJ study upon which Honda and its *amici* rely actually *undercuts* rather than supports petitioners' arguments. Thus, although the Equal Employment Advisory Council asserts that the "RAND[-ICJ] study . . . reported massive increases in the number and size of punitive damage awards in business and contract cases, including employment claims, between 1960 and 1984," EEAC Br. at 15, a review of the RAND-ICJ study reveals that it "reported" no such thing.

Indeed, the RAND-ICJ study began by noting that the debate regarding the putative punitive damages crisis has been infected by many such wishful and tendentious reports. Thus,

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[8] The American Council of Life Insurance additionally cites an obscure and decidedly non-empirical article, W. Volz & M. Fayz, *Punitive Damages and the Due Process Clause: The Search for Constitutional Standards*, 69 U. Det. Mercy L. Rev. 459, 462 n.17 (1992), for the proposition that "the trend toward larger punitive damages awards . . . 'appears to continue unabated.'" ACLI Br. at 7. No data is cited to support that assertion.

the RAND-ICJ researchers observed that, "as with many other civil justice issues, the debate [concerning punitive damages] has proceeded without much attention to facts." RAND-ICJ Study at i. Moreover, "despite the attention [punitive damages awards] have received, there has been little empirical analysis of their number, their size, or the conditions under which they occur." *Id.*, at v. The RAND-ICJ researchers set out to change that state of affairs, examining all civil jury trials in San Francisco County, California and Cook County (Chicago), Illinois from 1960 to 1984 and all civil jury trials in the state of California from 1980 to 1984. *Id.*

Far from depicting a crisis, the RAND-ICJ "analyses show that the incidence of punitive damages has been quite small throughout the 25-year period in Cook County (*on average, less than three such awards per year*) and in San Francisco County (*one per year*)." *Id.* at v (emphasis added). Furthermore, although *"[p]roduct liability cases have been of special concern to many critics, . . . our analyses indicate that punitive damages were awarded in only four product liability cases in San Francisco and two in Cook County from 1960 through 1984."* *Id.* (emphasis added). As re-analyzed by Judge Richard M. Posner and University of Chicago Law Professor William M. Landes, the RAND-ICJ data demonstrate that during the 25-year period studied: "only eight-tenths of 1 percent of all jury trials in San Francisco in products liability cases resulted in . . . an award [of punitive damages]; the corresponding figure for Cook County was only one-tenth of 1 percent." William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law* (1987), at 306-07.

Along the same lines, the RAND-ICJ analysts carefully noted that: "[i]n the 1980's in Cook County the number of punitive damage awards for personal injury cases barely increased, but the amount of money awarded rose sharply. After having awarded only $1.6 million (in 1984 dollars) during the previous twenty years, Cook County juries awarded $27 million during the early 1980's. *Most of the dollars were awarded in three cases with exceptionally large awards.*" RAND-ICJ Study at v-vi (footnote omitted; emphasis added). Similarly, "[i]n San

Francisco [County], the total amount of money awarded in punitive damages increased sharply in the late 1970's; between 1980 and 1984 the same amount was awarded as in the immediately preceding period, although the total number of personal injury trials dropped sharply." *Id.* at vi.

Although the RAND-ICJ researchers noted that the largest awards of punitive damages found in their 25-year survey were rendered during the tail-end of that survey, they nevertheless concluded that, overall, "*punitive damages were rarely awarded in personal injury litigation and when awarded were usually small.*" *Id.* at vi (emphasis added).

Once again, as Professor Saks has emphasized, the results of the RAND-ICJ study are consistent with the conclusions of "every [other] empirical study of the [punitive damages] question." Saks, *supra*, 140 U. Pa. L. Rev. at 1254. In particular, ***like the RAND-ICJ study, four other empirical studies have "reached conclusions that, to say the least, fail to support" the claim that "punitive damages have grown dramatically in both frequency and size."*** *Id.* (emphasis added).

These four studies are discussed below in chronological order.

1) LANDES AND POSNER STUDY (1987) – As the Court well knows, punitive damages have been the subject of controversy for at least a decade. "Because so much concern ha[d] been expressed about runaway juries imposing colossal punitive damage awards in products liability cases," Judge Posner and Prof. Landes "attempted to estimate the quantitative importance of such awards by examining all reported products liability cases in the federal courts of appeals from the beginning of 1982 through November 1984." Landes and Posner, *The Economic Structure of Tort Law*, *supra*, at 302.[9]

[9] Posner and Landes took pains to "note that the sample itself is likely to be unrepresentative of the universe of products liability cases – *but unrepresentative in a direction that tends to bias our estimate against the hypothesis we test, and reject: that punitive damages are being overused in modern products liability law.*" Landes and Posner, *supra*, at 302 (emphasis added). Thus, they explained that:

> [t]he economic theory of litigation predicts that cases most likely to be litigated and appealed will be those where the law is most uncertain and where damages largest. This suggests that *our sample will overstate the relative importance of punitive damages in products liability cases*; an award of punitive damages will increase the probability of an appeal.

Id., at 302-03 (footnote omitted; emphasis added).

Judge Posner and Prof. Landes subsequently enlarged their sample, but the addition of more data further validated rather than undercut their initial findings. Accordingly, they concluded that: "*[t]he insignificance of punitive damages in our samples is evidence that they are not being routinely awarded.* Out of a total of 359 cases in all of our samples, punitive damages were allowed in only seven – 2 percent." *Id.*, at 305-06 (emphasis added). Judge Posner and Prof. Landes further observed that, during the 1982-84 period, "*[t]he average award of punitive damages* in those seven cases *was less than $500,000, slightly more than the average actual damages* awarded in those cases." *Id.*, at 306 (emphasis added). Finally, their research led them to conclude that *punitive damages were "relatively insignifican[t]. . . ."* *Id.*, at 304.

2) GAO STUDY (1989) – The U.S. General Accounting Office ("GAO") analyzed the frequency and size of punitive damage awards by collecting and reviewing court records in all (305) products liability cases resolved through trial between 1983 and 1985 in five representative states – Arizona, Massachusetts, Missouri, North Dakota and South Carolina. GAO, *Product Liability: Verdicts and Case Resolutions in Five States*, GAO/HRD-89-99 (Sept. 1989) ("GAO Study"), at 2.

The GAO reached the same conclusions as did Judge Posner and Professor Landes and the RAND-ICJ researchers: that punitive damages were awarded infrequently (in only 23 of 305 cases –7.5%) and "were highly correlated (.71) [in size] with the compensatory damages [awarded]." *Id.*, at 3. For

example: "[t]he 23 punitive damage awards had an average just under $1.3 million and a median of $400,000, which are only slightly larger than the average and median compensatory awards in those 23 cases (average of $906,000 and median of $375,000.)" *Id.*, at 29.

3) AMERICAN BAR FOUNDATION STUDY (1990) -- Stephen Daniels and Joanne Martin, Senior Research Fellow and Associate Director, respectively, of the American Bar Foundation ("ABF"), examined 25,627 jury verdicts handed down in state trial courts from 1981 to 1985, a period deliberately selected for study because of the assertedly large numbers of excessive punitive damages awarded during the early 1980's. Stephen Daniels and Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1, 28 (1990). Daniels and Martin drew data from state jury verdict reporters in 47 counties in 11 states. The sample was regionally balanced in areas of "varying population sizes and socio-economic make-ups." *Id.* at 29.

Like the researchers who published the three studies that preceded their own, Daniels and Martin found little empirical support for the notions that punitive damages were routinely awarded; that such damages were routinely awarded in large, let alone excessive, amounts; that the number of awards was rapidly increasing; that the size of awards was exponentially expanding; or that whatever problems may have existed on any score in any location were representative of a problem that was truly national in scope and did not represent a merely local anomaly.

Thus, for example, Daniels and Martin found that "punitive damages were awarded in only 34 of the 967 products liability cases evaluated." *Id.*, at 38. *See id.*, Table V. The ABF researchers identified a second major controversy in punitive damages as the "debate over the dollar value of punitive damage awards." *Id.* at 39. Daniels and Martin not only found that punitive damage awards were unusual, but also that they were relatively small in size. The median punitive damages award in jurisdictions having 10 or more punitive awards ranged from under $10,000 in some counties to $204,000 in San Diego. *Id.* at 42. Finally, Daniels and Martin confirmed the results

recorded by other researchers -- that punitive damages were not increasing rapidly in number or size, *see id.*, at 43-57, nor were they "out of proportion," let alone "grossly" or "excessively" so. *See id.*, at 57-62.

On the basis of these findings, Daniels and Martin concluded that, contrary to the claims made by various self-described "tort-reformers":

> ***punitive damages were not routinely awarded. Nor were punitive damages typically given in amounts that "boggle the mind."*** Juries awarded punitive damages infrequently, and when they were awarded, the amount was generally modest. . . . ***The punitive damages system that emerges from this study is significantly different than the system described by the [tort] reformers, and does not provide evidence of a nationwide problem. Thus, one should view with skepticism the claims that juries routinely awarded punitive damages in large amounts, and that these developments were nationwide in scope.***

Id., at 43 (emphasis added).

4) RUSTAD-KOENIG STUDY (1992)[10] -- Profs. Rustad and Koenig examined data regarding every products liability case filed anywhere in the United States during the 25-year period from 1965 through 1990 that resulted in a punitive damages award. 78 Iowa L. Rev. at 32-36. Their findings included the following:

(A) Punitive Damages Were Rarely Awarded in Products Liability Cases -- Profs. Rustad and Koenig report that, "[w]ith the exception of asbestos litigation, punitive damage awards in products liability are actually decreasing since the mid-1980s." 78 Iowa L. Rev. at 36. Indeed, of all the products liability cases nationwide over the 25 years from 1965 to 1990,

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[10] See note 6, *infra* and accompanying text.

punitive damages were awarded in only 355 cases; of those cases, 95 (27%) involved asbestos. The researchers located seven awards from 1965 through 1970 (none for asbestos) and seventeen awards from 1971 through 1975 (again, none for asbestos). Between 1976 and 1980, awards increased to forty-one (including the first two awards of punitive damages in asbestos cases), and increased again between 1981 and 1985 to 139 (including 20 awards in asbestos cases). Finally, between 1986 and 1990, the total number of awards increased to 151 cases (including 73 asbestos cases). 78 Iowa L. Rev. at 38-45.

(B) The Number of Non-Asbestos-Related Punitive Damages Declined from 1986 to 1990 -- Although the data reveal an absolute increase in the number of punitive damages awards during the entire period studied, the same data also demonstrate a highly significant countervailing trend: both an absolute and a relative decline in the number of non-asbestos-related cases from the penultimate five-year period to the final five-year period (dropping from 119 to 78 -- a *decrease* of 65%). Put differently, *once asbestos-related cases are controlled for, the number of punitive damages awards in products liability cases actually declined from 1986 to 1990.* 78 Iowa L. Rev. at 38-45.

(C) Punitive Damages Awards Are Not "Skyrocketing" in Size and Are More Than Double the Size of Compensatory Damages Awards in Less Than Half the Cases -- As stated earlier, punitive damages awards occur much less frequently than is generally believed. Punitive damages awards are also much smaller in size than is generally believed. To be sure, awards of punitive damages exceeded awards of compensatory damages in 208 (59%) of the cases reported in the Rustad-Koenig Study. Moreover, in 38% of the cases reported, punitive damages were more than twice the amount of compensatory damages. On the other hand, however, compensatory damages exceeded punitive damages in 35% of the cases and were more than twice the size of the punitive awards in 23% of the cases. 78 Iowa L. Rev. at 45-51.

The median compensatory damage award for the 355 cases found was $500,100. The median punitive damages award for the 355 cases was $625,000, *i.e.*, only 25% higher than the median compensatory award. Both figures are fully consistent with those depicted in the RAND-ICJ Study. Rustad-Koenig at 29. When adjusted for inflation, this punitive damages award median is quite similar to the RAND-ICJ figures. That study found that a number of extremely large awards raised the average and accounted for a majority of total amounts awarded. The RAND-ICJ median for the total award, including both compensatory and punitive damages, is $1,457,600. One-fourth of these total awards were $500,000 or less. When inflation was controlled for (through the use of constant 1983 dollars), the median punitive damages award was $688,500, as compared with $516,000 in compensatory damages. *Id.*

In sum, the five empirical studies are unanimous in their findings: contrary to popular myth, and the arguments of Honda and its amici, punitive damages are not awarded frequently, they are neither excessively large in size nor disproportionate to compensatory damages awards, and they not skyrocketing in frequency, size, or proportion.

III. JURIES CAN BE TRUSTED TO MAKE COMPETENT, FAIR, AND UNBIASED DECISIONS.

Honda and its *amici* variously assert that juries cannot and should not be trusted to make important decisions, such as setting the size of punitive damages awards, because lay jurors are either incompetent or biased or both. Thus, petitioners, which put great stock in the good judgment of "lay men and women," Pet. Br. at 9, when it comes time for them to purchase automobiles, nonetheless opine that:

> *It is beyond dispute that juries often base their verdicts on extra-legal considerations and may be led astray* by bias, by naked redistributionist impulses, by a misunderstanding of the law, or by many other influences or deficiencies that

> should be unacceptable in our system of justice. These concerns are compounded where punitive damages are at issue, for the setting of an appropriate penalty is wholly outside the experience of lay men and women.

Id. (emphasis added). Moreover, says Honda, "it is doubtful that any jury charge, no matter how detailed, could obviate the need for judicial excessiveness review. ***The empirical evidence is overwhelming that juries often do not understand instructions, and even a jury that does grasp the judge's charge may fall subject to passion, bias, arbitrariness, or simple misjudgment.***" *Id.* at 10 (emphasis added).[11]

Curiously, though, 12 pages further into its brief, when it comes time for Honda to identify the "overwhelming"

---

[11] Not surprisingly, Honda's *amici* share its disdain for the jury. *See, e.g.*, ACLI Br. at 8 ("it is widely recognized, and has often been noted by this Court, that when awarding punitive damages, juries sometimes make those awards under the influence of passion and prejudice."); *id.* at 11 ("even the most fair and impartial jury lacks the proper framework for determining what amount of punitive damages will best accomplish the goals of punishment and deterrence. The jury, as an institution, is not particularly well-suited to making broad policy decisions and is not politically accountable for those decisions."); Brief *Amicus Curiae* of the Washington Legal Foundation ("WLF Br."):

> Jurors are not likely to comprehend the myriad adjustments to financial data necessary to fairly and accurately assess a corporation's financial status. Moreover, the fact that a corporation's wealth may be valued in the millions, if not billions, of dollars adds to the risk that the sensibilities of jurors may be overwhelmed by such enormous sums of money. Consequently, evidence of extremely large dollar figures, combined with sophisticated financial arguments, "may all begin to blur in the minds of many jurors." As a practical matter, jurors may thus become receptive to the simplest argument available – that punitive damages should be based on an arbitrarily selected percentage of defendant's "wealth."

WLF Br. at 21 (citation omitted).

"empirical evidence" of juror ineptitude, Honda lowers its voice and modulates its tone:

> While a whole constellation of considerations leads judges to arrive (by and large) at well-reasoned and objectively "correct" decisions, . . . [s]tudents of the jury . . . have found that juries *sometimes* "appl[y] evidence incorrectly, award[] compensation for expenses they were not supposed to consider, and consider[] extralegal factors in determining liability and punitive awards." . . . *More generally, it seems clear* from the work of social scientists that *juries "are occasionally biased* against corporate defendants."

Pet. Br. at 22-23 (emphasis added; citing a 1985 study, a 1987 study, and two studies from 1989).

A review of the more recent empirical studies on jury decisionmaking helps to explain why Honda turned down its rhetoric so suddenly. Not only is the empirical evidence proving jury incompetence and bias not "overwhelming," that evidence is highly controverted. Indeed, the most recent studies about juries reveal that their decisions are as reliable and accurate as those of judges and that if jurors are biased at all, they are biased *against* tort plaintiffs and *in favor of* corporate defendants.

For example, on the question of bias, a 1992 study reported that,

> [r]ather than revealing jurors willing and eager to impose on business the costs of plaintiffs' injuries, our findings show that jurors were suspicious of the legitimacy of plaintiffs' claims and concerned about the personal and social costs of large jury awards. [Moreover,] [d]espite insistence on product safety and high expectations of business, jurors were *[A]* generally favorable toward business, *[B]* skeptical more about the profit motives of

> individual plaintiffs than of business defendants, and *[C]* committed to holding down awards.

Valerie P. Hans and William F. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate* (University of Delaware, May, 1992), at 11 (reprinted in 26 L. & Soc. Rev. 85 (1992)).

Generally, "tort jurors had strong negative views about the frequency and legitimacy of civil lawsuits." *Id.* Specifically:

- "83% of the tort jurors sampled either agreed or strongly agreed with the statement that '[t]here are far too many frivolous lawsuits,'" *id.* at 41, Table 1;
- "81% agreed or strongly agreed with the proposition that '[p]eople are too quick to sue . . .,'" *id.*;
- "39% agreed or strongly agreed with the assertion that '[t]he money awards that juries are awarding in civil cases are too large,'" *id.*; and
- "32% agreed or strongly agreed that '[t]he number of lawsuits show that our society is breaking down.'" *id.*

On the other hand, "[c]ontrary to the skepticism shown plaintiffs, corporate defendants were typically not subjected to such vigorous scrutiny," *id.*; there was "little evidence of tough standards and punitiveness [by jurors] toward[s] . . . corporation[s] . . . ," *id.*, at 18; most jurors evinced only "scattered concern about the profit motive causing business to cut corners," *id.* at 23; most jurors thought that an "organization's assets should not be and were not relevant to the liability and award decisions," *id.* at 26; and jurors' "comments derogating business were rare compared to the more frequent negative evaluations of the plaintiffs and their [putatively] mercenary motives." *id.* at 24.

These conclusions are borne out by additional findings:

- 57% of the tort jurors sampled agreed or strongly agreed with the statement that "[t]he threat of lawsuits is so prevalent today that it interferes with the development of new and useful products";
- 51% agreed or strongly agreed with the view that "[b]ig business . . . is adequately concerned with the safety of its workers"; and
- 32% agreed or strongly agreed with the notion that "[t]he courts have meddled so much in the workplace that many businesses are not able to remain competitive."

Id. at 42-43.

The survey results published by Profs. Hans and Lofquist are consistent with a recent study of the outcomes of 90,000 personal injury cases. As described last month in the *Wall Street Journal*:

> Juries in personal-injury cases appear to have had a significant change in heart: In recent years, they have been rejecting injury claims more often.
>
> According to a study of more than 90,000 cases by Jury Verdict Research, a court-watching group, juries in 1992 sided with alleged personal injury victims in about 52% of suits that went to trial, down from 61% in 1987 [*i.e.*, a 15% relative decline]. Over the same period, plaintiffs' chance of winning product-liability suits declined to 43% from 54% [*i.e.*, a relative drop of 20%]. In cases against consumer-products manufacturers, the drop was even sharper: consumers won about 39% of these cases in 1992, down from 55% in 1987 [*i.e.*, a relative decline of 29%.].
>
> Jury specialists say the powerful and deep-pocketed advocates of reform have spread their message so successfully in the media that juries have changed their behavior. "The

> publicity of the business and insurance groups has played a major role in shifting both public and judge opinion," says Theodore Eisenberg, a professor at Cornell Law School. "Either there was a liability crisis or people got sold one, and attitudes changed in a way that led to more victories for defendants."

Edward Felsenthal, *Juries Display Less Sympathy in Injury Claims*, *Wall St. J.*, March 21, 1994 at B1.[12]

Similarly, on the question of juror competence in setting awards in comparison with the abilities of judges to do the same, not only are Honda's charges not supported by any empirical research, those charges are refuted by such research. *See, e.g.*, Neil Vidmar and Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 Iowa L. Rev. 883, 896 (1993) (data collected and analyzed in course of comprehensive empirical study comparing decision-making by jurors and judges "lend no support to the widely-held view that jurors are more generous

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[12] *See* Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. Rev. 731, 770 (1992) (reporting that "from 1985 to the time of the most recently available data, the products battle has been a slaughter. Filings began to plummet; success rates continued to fall. Most measures of awards - means, expected returns, and sums - are down. Medians are equivocal." For example, "plaintiff success rates in published opinions fell from 56% in 1979 to 39% in 1989, a drop of 29%. At the federal district court level ... plaintiff success rates fell from 41% in 1979 to 31% in 1989, a drop of 24%." *id.* at 741. *See also Quayle's View on Liability Suits Is Widely Held, Poll Shows*, Wall St. J., Feb. 19, 1992, at B10; Sean F. Mooney, *Crisis and Recovery: A Review of Business Liability Insurance in the 1980s*, Insurance Information Institute, May 1992, at 19 ("A 1992 survey shows that 44 percent of the public believes only about half of the plaintiffs in [civil liability] suits have just cause to file suit."); Edith Greene, Jane Goodman, and Elizabeth F. Loftus, *Jurors' Attitudes About Civil Litigation and the Size of Damage Awards*, 40 Am. U. L. Rev. 805, 814 (1991) (90% of jurors polled "agreed that there are too many lawsuits."); Demarest & Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?* 18 St. Mary's L.J. 797, 824-25 (1987).

than judges and arbitrators in awarding noneconomic damages. Moreover, the data do not support the view that the reasoning of laypersons in calculating the award is substantially different from that of legally trained persons."); Kevin M. Clermont and Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 Corn. L. Rev. 1124 (1992) (revealing that judges are more pro-plaintiff than jurors; in personal injury cases, plaintiffs win 50% of all bench trials, while winning in only 29% of the cases tried to a jury); and Vidmar & Rice, *supra*, 78 Iowa L. Rev. at 901 ("*our findings . . . offer a significant challenge to the argument that legal professionals are more capable and consistent than juries in awarding noneconomic damages.*" (emphasis added)).

Finally, Honda's deprecations against the jury run counter to the consensus views of more than 100 participants who attended a 1992 symposium on the future of the civil jury system, which was jointly sponsored by the American Bar Association and the Brookings Institution. "The participants represented a broad cross-section of users of the legal system, its practitioners, its judges, and the academic scholars who study it." *Charting a Future for the Civil Jury System* (1992) at vii.[13]

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[13] The participants included REPRESENTATIVES OF VARIOUS OF HONDA'S *AMICI*, and CORPORATE MEMBERS OF THOSE *amici* (*e.g., the Alliance of American Insurers; National Association of Independent Insurers; Aetna Life & Casualty; State Farm Insurance; Travelers Insurance Co.; Monsanto; General Electric; Ford Motor Co.; and Chevron*), COUNSEL TO THOSE *AMICI* OR THEIR CONSTITUENT CORPORATE SPONSORS (*e.g., Mayer, Brown & Plan; Kirkland & Ellis; Venable, Vartjer, Howard & Civiletti; Foley & Lardner; Patton, Boggs & Blow; Crowell & Moring; and Jenner & Block*), REPRESENTATIVES OF GOVERNMENT AGENCIES AND PRIVATE THINK TANKS (*e.g., U.S. Department of Justice; Federal Judicial Center; National Jury Project; American Bar Foundation; U.S. Sentencing Commission; RAND-Institute for Civil Justice; National Center for State Courts; State Justice Institute; and American Judicature Society*), DISTINGUISHED MEMBERS OF THE LOWER FEDERAL COURTS (*e.g., Hon. Kenneth W. Starr; Hon. Marvin E. Aspen; Hon. Jim R. Carrigan; Hon. H. Lee Sarokin; Hon. Joseph F. Weis, Jr.; and Hon. William G. Young*), AND CELEBRATED LEGAL SCHOLARS (*e.g., Prof. George Priest of Yale Law School, Dean Peter Schuck of Yale Law School, Prof. Marc Galanter of the University of Wisconsin Law School, Prof.*

The extensive findings of the symposium participants regarding the role and strength of the jury system, the attitudes and skills that jurors bring to their tasks, the consistency and defensibility of the verdicts and awards that jurors make, and various demands to limit the discretion and responsibilities of juries are quite apposite.[14] Most pertinently, the report stated:

Barbara Allen Babcock of Stanford Law School, and Prof. Stephen Saltzburg of National Law Center - The George Washington University).

[14] The key findings and conclusions of the ABA/Brookings Institution Symposium on the Civil Jury System included:

> ***First***, the jury is a valuable process for decisionmaking and an effective means for arriving at a fair resolution of disputed facts. ***The evidence indicates the jurors take their responsibilities very seriously and attempt to reach fair and just results. Moreover, there is no evidence that judges or any other decisionmaker systematically would produce any more consistent or defensible set of results in similar circumstances than juries.*** Indeed, it is our collective experience, backed by the available empirical evidence, that the rate of agreement between judges and juries is generally high. As one participant observed, the amateurism and transience of the jury are its virtues not its vices. *Civil Jury System* at 8 (emphasis added).
>
> ***Second***, *the jury provides important protections against the abuse of power by legislatures, judges, the government, business or other powerful entities.* In the words of Chief Justice William Rehnquist, "the founders of our Nation considered the right to trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary." *Id.* at 9 (emphasis added).
>
> ***Third***, the jury brings broadly based community values to dispute resolution. . . . We believe *juries provide the best mechanism for bringing broadly based community values to bear on the issues* involved in private disputes but [sic] doing so with their public function in mind. It is in the courtroom that the community's sense

A commonly voiced concern about juries is that precisely because they consist of randomly chosen individuals their decisions can have a certain "random" component. As a result, it has been claimed, a number of different juries hearing the same case, even when drawn from the same local population, may produce a substantial variation in results.

> of fairness, of justice, of right and wrong is expressed. It is here that the conflict between the regulation of society and its impact on organizations and individuals gets adjusted and integrated, and where competing values are balanced. *Id.* (emphasis added). . . .
>
> ***Fourth***, *the jury provides an important check on the bureaucratization and professionalization of the legal system. The involvement of jurors prevents adjudication from becoming technical and routinized, perhaps even distant and insensitive, as cases with similar fact patterns recur over and over before the same decisionmaker (the judge).* ***The jury brings common sense and fairness to its decisions,*** cutting through the arcane and often overly detailed presentation of information by lawyers and judges. *Id.* at 10 (emphasis added). . . .
>
> ***Finally***, *the jury system provides a means for legitimizing the outcome of dispute resolution and facilitating public understanding and support for and confidence in our legal system.* Law is the glue that helps hold society together. In a democratic society, confidence in the legal system is therefore essential. *Id.* (emphasis added).

Accordingly, the symposium participants' ultimately concluded that:

> *the civil jury system is valuable and works well. Most of the participants do not believe it is "broken," and therefore it need not be "fixed." The jury system is a proven, effective, and important means of resolving civil disputes. Accordingly, there was strong sentiment among symposium participants to resist efforts to reduce the jury's role:* indeed, some participants urged that the range of matters submitted for jury decisionmaking be expanded. *Id.* at 2-3 (emphasis added).

> *This same argument can and should be applied to judges or any other single decision maker as well. Indeed, all individuals can have biases that can distort outcomes. At least with juries there is an attempt during voir dire to eliminate potential jurors with obvious biases from serving as decisionmakers. In addition, any remaining biases of individual jurors often are canceled out in the jury as a whole.*

Id. at 26. For this reason, symposium participants carefully considered, and "strongly rejected," various proposals to make "jury outcomes . . . less random," such as by "reduc[ing] juror discretion." *Id.* Accordingly,

> with few dissents, the participants opposed statutory changes that would provide schedules for ranges of non-economic damage (generally for pain and suffering) that juries would be permitted to award to plaintiffs of certain ages and with particular injuries. As several participants stated while at the symposium, "the past should not determine the future" when it comes to damage awards. ***Jurors instead should be free to bring their own standards for what is just compensation to each case without being limited in any fashion.*** For similar reasons, a majority of participants would not allow jurors to be informed of damage awards in similar cases in other jurisdictions, although some participants favor this in the hope of narrowing the range of such awards.

CONCLUSION

The judgment of the Supreme Court of Oregon should be affirmed.

DATE: March 31, 1994

Respectfully submitted,

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APPENDIX A

1. *Stephens, Inc. v. Geldermann, Inc.*, 962 F.2d 808 (8th Cir. 1992) (discussed in text)

2. *Ingram v. Acands, Inc.*, 977 F.2d 1332 (9th Cir. 1992) (sufficiency of the evidence, not excessiveness of the award was at issue)

3. *Hafner v. Brown*, 983 F.2d 570 (4th Cir. 1992) (discussed in text)

4. *Hygh v. Jacobs*, 961 F.2d 359 (2d Cir. 1992) (discussed in text)

5. *Loughman v. Consol-Pa. Coal*, 6 F.3d 88 (3d Cir 1993) (discussed in text)

6. *Mitchell v. Globe International Publishing*, 817 F. Supp. 72 (W.D. Ark. 1993) (punitive damages were not at issue; only compensatory damages were remitted)

7. *Hebron Public School Dist. No. 13 v. U.S. Gypsum*, 953 F.2d 398 (8th Cir. 1992) (sufficiency, not excessiveness, was at issue)

8. *Wallace v. Mulholland*, 957 F.2d 333 (7th Cir. 1992) (sufficiency, not excessiveness, was at issue)

9. *In re Hawaii Federal Asbestos Cases*, 960 F.2d 152 (9th Cir. 1992) (sufficiency, not excessiveness, was at issue)

10. *Bergeson v. Dilworth*, 959 F.2d 245 (10th Cir. 1992) (excessiveness was not at issue)

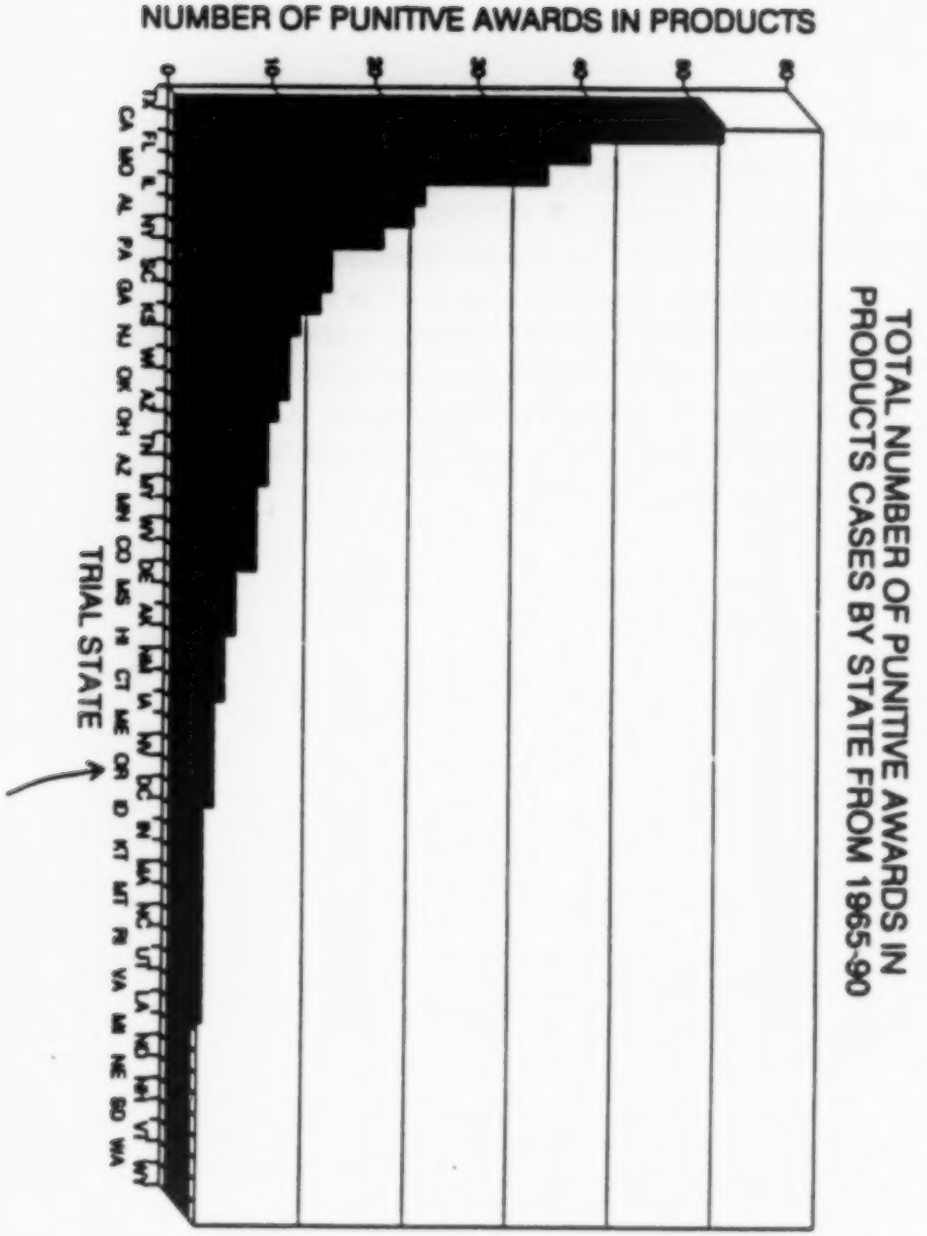
11. *Barwell v. Barber-Colman Co.*, 953 F.2d 637 (4th Cir. 1992) (award struck on ground that punitive damages are not allowed in strict liability case under South Carolina law; excessiveness was not at issue)

12. *Fenstermacher v. Telecast*, 1992 WL 175114 (D. Kan. 1992) (remittitur impossible as a matter of law because Kansas juries can only recommend that punitive damages should be awarded; court fixes the size of the award)

13. *Maharis v. Omaha Vaccine Co.*, 967 F.2d 588 (9th Cir. 1992) (sufficiency, not excessiveness, was at issue)

APPENDIX B

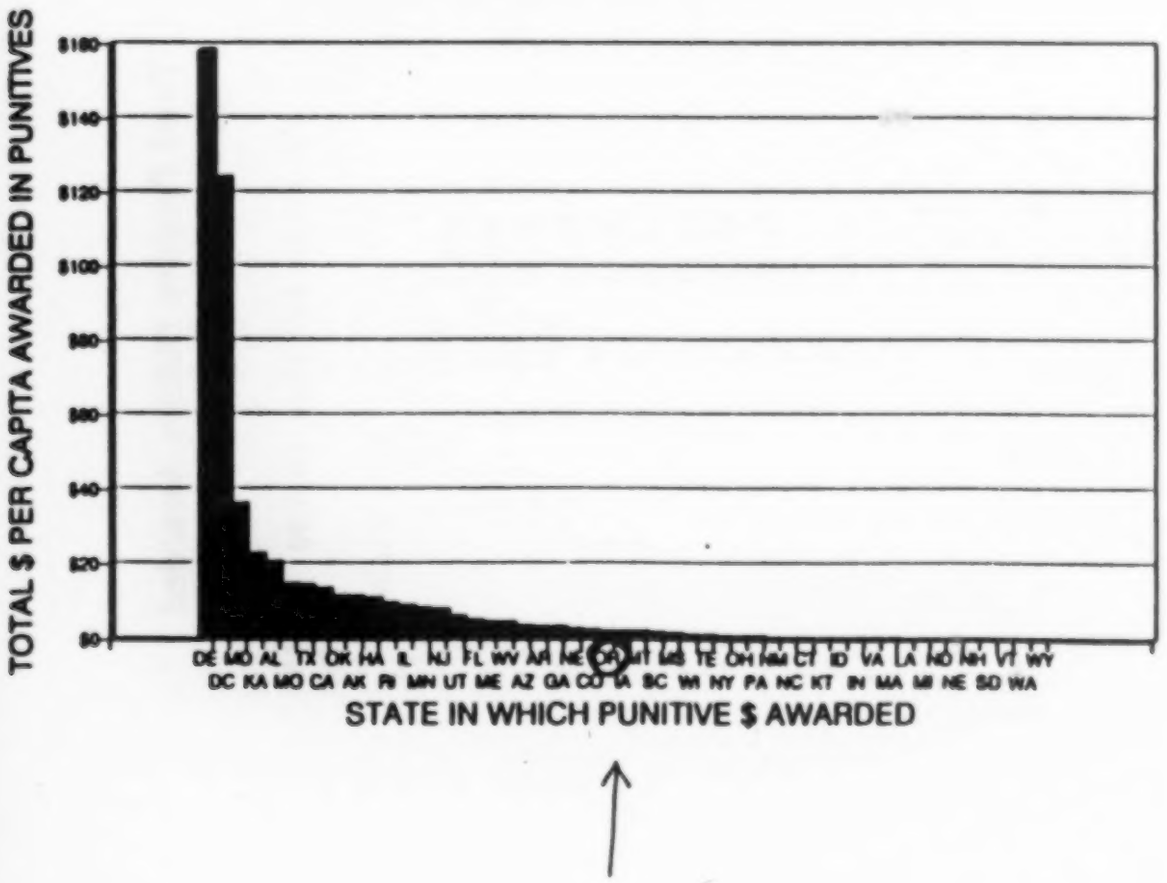
NOTE: The following tables and graphs were derived from data contained in the database that was formed for the research monograph by Michael Rustad and Thomas Koenig, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1 (1992).



Total Number of Punitive Damages Awards in Products Liability Cases (1965-90)

State	Number	Rank
TX	51	1
CA	38	2
FL	34	3
MO	22	4
IL	21	5
AL	18	6
NY	13	7
PA	13	8
SC	12	9
GA	10	10
KS	9	11
NJ	9	12
WI	9	13
OK	8	14
AZ	7	15
OH	7	16
TN	7	17
AZ	6	18
MD	6	19
MN	6	20
WV	6	21
CO	4	22
DE	4	23
MS	4	24
AK	3	25
HI	3	26
NM	3	27
CT	2	28
IA	2	29
ME	2	30
NV	2	31

ALL PRODUCT LIABILITY PUNITIVE DAMAGE $ DIVIDED BY POPULATION OF STATE 1965-90



2 3 3 3 5 5 7 8 9 9 4 4 4 4 4 4 4 4 4 9 9 5

2 1 1 1 1 1 1 1 1 0 0 0 0 0 0 0 0 0

OR
DC
ID
IN
KY
MA
MT
NC
RI
UT
VA
LA
MI
ND
NE
NH
SD
VT
WA
WY

Total Punitive Dollars Awarded in Products Liability Cases

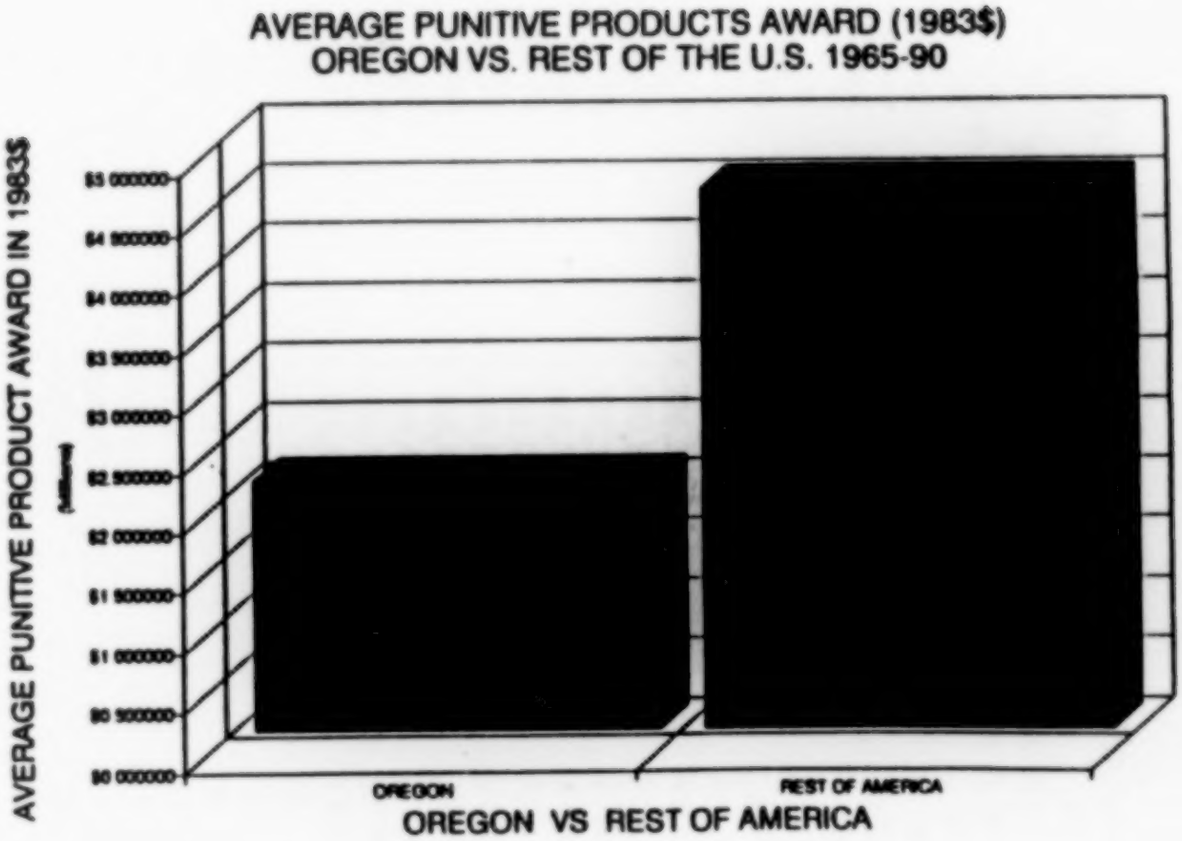
Per Capita Per State, 1965-90

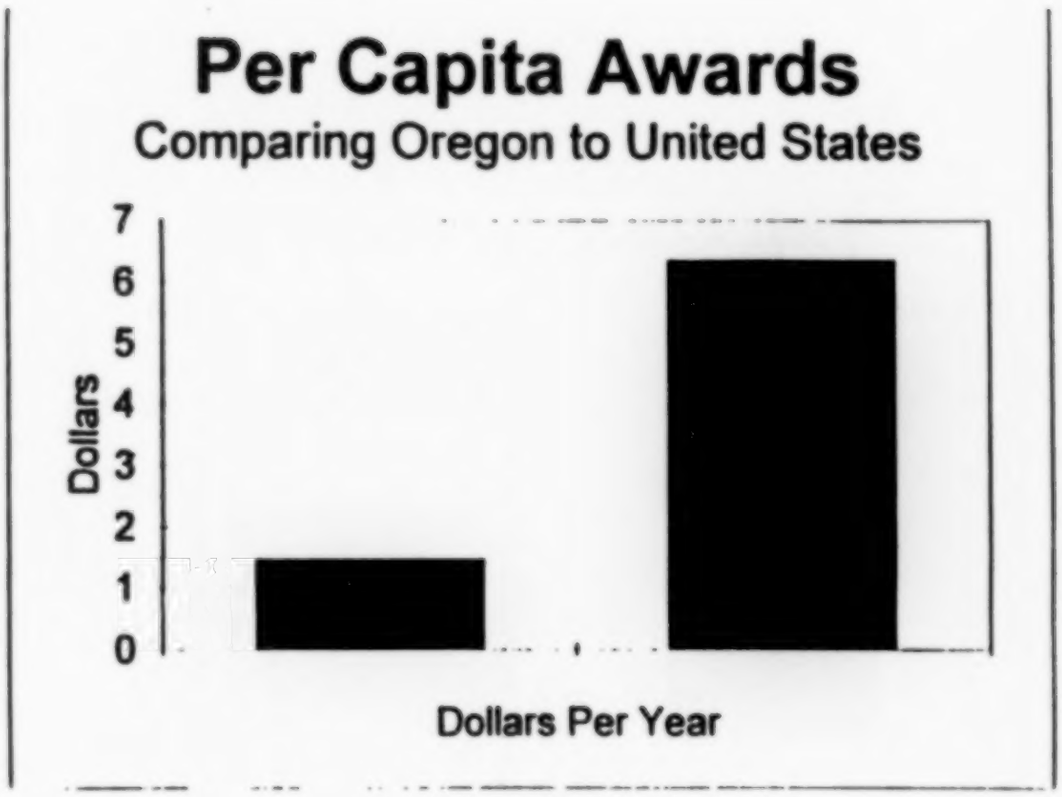
State	$ Per Capita	
DE	158.2	1
DC	124.17	2
MD	36.34	3
KS	22.62	4
AL	20.42	5
MO	14.76	6
TX	14.37	7
CA	13.28	8
OK	11.58	9
AK	11.4	10
HI	10.81	11
RI	9.61	12
IL	8.97	13
MN	8.07	14
NJ	7.79	15
UT	5.95	16
FL	5.15	17
ME	4.32	18
WV	4.25	19
AZ	3.38	20
AR	2.96	21
GA	2.92	22
NE	2.52	23
CO	2.25	24
OR	2.84	25
IA	1.82	26
MT	1.7	27
SC	1.32	28
MS	1.21	29
WI	0.83	30
TN	0.75	31
NY	0.64	32
OH	0.62	33
PA	0.49	34
NM	0.28	35
NC	0.23	36
CT	0.21	37
KY	0.13	38
ID	0.01	39
IN	0.09	40
VA	0.04	41
MA	0.01	42
LA	0	43
MI	0	44
ND	0	45
NE	0	46
NH	0	47
SD	0	48
VT	0	49
WA	0	50
WY	0	51

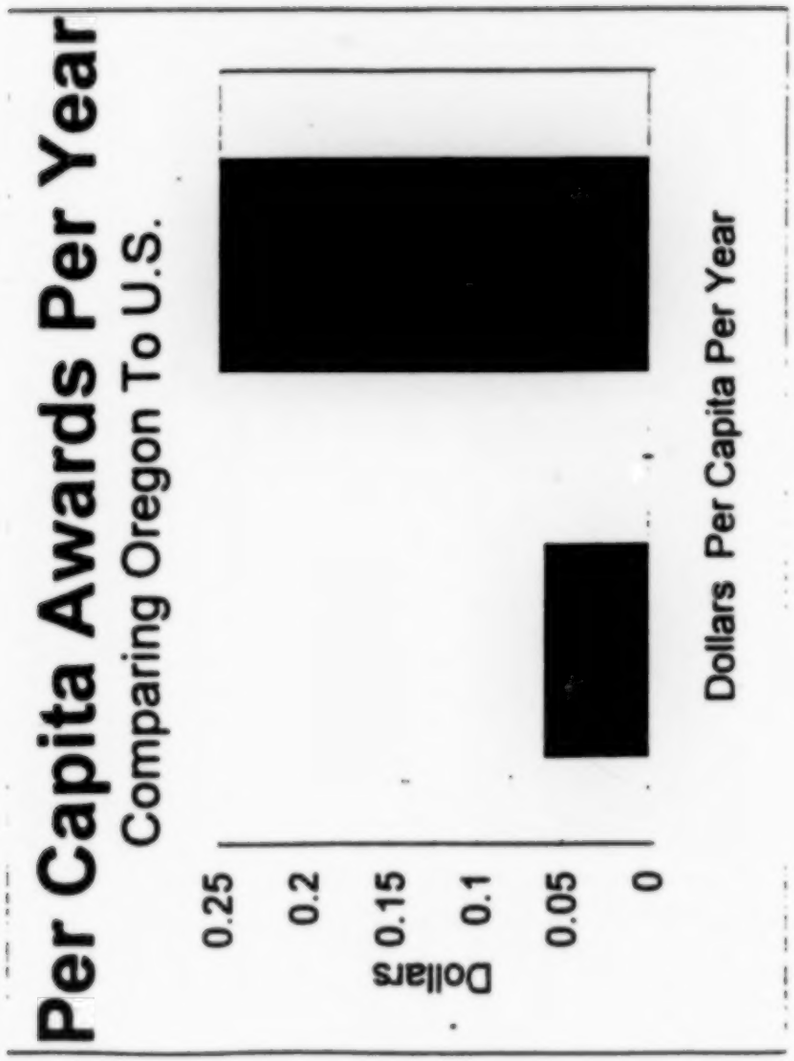
Punitive Damages Awarded Per Year

Total Punitive Damges Awarded, 1965-90
Inflation Adjusted 1983 Dollar, Divided by 25

State	Punitive $	Rank
CA	11,769,881	1
TX	8,980,378	2
IL	5,512,721	3
MD	4,226,379	4
DE	3,570,800	5
AL	2,727,520	6
DC	2,665,589	7
MO	2,631,000	8
FL	2,399,866	9
NJ	2,248,486	10
KS	1,925,417	11
OK	1,548,076	12
WI	1,511,512	13
MN	1,291,040	14
GA	667,931	15
NY	467,515	16
AZ	413,951	17
HI	401,301	18
UT	350,800	19
AR	303,000	20
RI	292,880	21
CO	248,150	22
AK	276,729	23
WV	267,876	24
OH	265,144	25
PA	226,506	26
SC	190,674	27
ME	188,832	28
TN	168,674	29
OR	166,880	30
IA	154,000	31
MS	117,426	32
NV	93,410	33
MT	53,648	34
NC	48,240	35
IN	30,580	36
CT	22,601	37
KY	18,500	38
ID	12,000	39
NM	12,817	40
VA	9,580	41
MA	1,520	42
LA	0	43
MI	0	44
ND	0	45
NE	0	46
NH	0	47
SD	0	48
VT	0	49
WA	0	50
WY	0	51


AVERAGE PUNITIVE PRODUCTS AWARD (1983$)
OREGON VS. REST OF THE U.S. 1965-90
AVERAGE PUNITIVE PRODUCT AWARD IN 1983$
OREGON
REST OF AMERICA
OREGON VS REST OF AMERICA


Per Capita Awards
Comparing Oregon to United States
Dollars
7
6
5
4
3
2
1
0
Dollars Per Year



Average Punitive Damages Awards in Products Liability Cases, 1965-90 (measured in inflation adjusted 1983 $)

Oregon	$2,086,000
Rest of United States	$4,522,991

Average Punitive Damages Awards, Per Capita in Products Liability Cases, 1965-90 (measured in inflation adjusted 1983 $)

Oregon	$ 2,842
Rest of United State.	$245,868

Total Number of Punitive Damages Awarded in Products Liability Cases, 1965-90

Oregon	$4,172,000
Rest of United States	$1,564,776,159

Average Punitive Damages Award in Products Liability Cases 1965-90 (measured in inflation adjusted 1983 $)

Oregon	$2,086,000
Rest of United States	$4,522,991

Per Capita Punitive Damages Awards For the 1965-90 Period and Per Capta Per Year (in parentheses)

Oregon	$1.47	($0.06)
Rest of the United States	$6.36	($0.25)

Supreme Court, U.S.
FILED
APR - 1 1994

No. 93-644

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

HONDA MOTOR CO., LTD; HONDA R&D CO., LTD; AND AMERICAN HONDA MOTOR CO. INC.,
Petitioners,

v.

KARL L. OBERG,
Respondent.

On Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF OF AMICUS CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENT

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BRIEF OF AMICUS CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENT

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association whose approximately 50,000 members primarily represent injured plaintiffs in civil actions. This case is of special interest to ATLA because it pertains to an integral part of ATLA's mission: the preservation of the constitutional right to trial by jury.

Justice in America is administered, in large part, by the American people themselves. The jury is a distinctively democratic institution, reflecting the common sense and conscience of the community, beholden to no personal ambition, economic interest, or political constituency. The value of an independent jury is reflected in the array of special interests which have mounted an intense and heavily financed campaign to undermine its rule, whether it be under the guise of "tort reform" or in less obvious ways, such as the attack on a state constitutional guarantee that is central to this case. The heart of Honda's challenge to the damages awards here is an attack on the jury.

Written consents of both parties to the filing of this brief have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Honda's petition for protection from punitive damage verdicts reflects, in part, the myths of the tort reform campaign. Empirical data demonstrates that large punitive awards are not common or routine.

The notion that excessiveness review of punitive verdicts is so deeply ingrained in the Anglo-American system of justice as to be mandated by the Due Process Clause is false. Oregon rules, which preclude new trial merely on grounds of the size of the verdict, but appear to permit new trial on grounds of passion or prejudice of the jury, is similar to the law in many states. Excessiveness review was seldom employed in English and early American cases. Even where accepted, this practice is not viewed as a fundamental right.

Nor does the *Mathews v. Eldridge* balancing test suggest that the lack of excessiveness review violates due process. The *Mathews* test is not the appropriate standard for state judicial procedures. Moreover, the test does not support

Honda's argument. The interest of private litigants in money damages is not weighty. Honda has not demonstrated that juries are inherently unreliable or biased.

Finally, principles of federalism and the command of the Tenth Amendment weigh heavily against this Court's intrusion into matters of state procedure and substantive law.

ARGUMENT

I. THE PURPORTED "CRISIS" IN PUNITIVE DAMAGES AND PRODUCTS LIABILITY DOES NOT WARRANT THE IMPOSITION OF FEDERAL CONSTITUTIONAL RESTRAINTS ON STATE TORT LAW.

Once again, the tort reform special interests come before this Court seeking to constitutionalize the law of punitive damages.[1]

For much of the past decade, a massive, highly organized, and well-financed campaign by tort reform advocates has attempted to blame problems experienced by the liability insurance industry and the business sector on product liability law, particularly "skyrocketing" punitive damage awards.

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[1] *See* Marc Galanter and David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 Am. U.L. Rev. 1393, 1410 (1993)(Tort reformers have waged . . . an ambitious litigation campaign that includes *Browning-Ferris, Haslip, TXO Production*, and other cases. One corporate counsel predicted: 'We're going to keep throwing the challenges up there until one of them sticks.'"). For a comprehensive list of amici in these cases, see Michael Rustad, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C.L. Rev. 91, 125-28 nn.156-63 (1993).

> Products liability law's pernicious effects, through its influence on insurance rates, thus were portrayed as reaching deep into the fabric of American life, as well as crippling the business community.
>
> Using every technique of modern media-shaping, tort reform groups sought to assure that the public believed that products liabiiity law was the cause of this threat to our way of life.

Theodore Eisenberg and James A. Henderson, *Inside the Quiet Revolution in Products Liability*, 39 U.C.L.A. L. Rev. 731, 793-94 (1992). *See also* Stephen Daniels and Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1, 9-14 (1990)(describing "slice-of-death" advertising and other public relations techniques employed by tort reformers).

A predominant myth purveyed through this campaign is that large punitive damage verdicts have become common or routine. That assertion has been made to this Court by tort reform interests in previous cases. *See* Michael Rustad, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C.L. Rev. 91, 128-39 (1993). Honda repeats that assertion in this case. Pet. Br. at 20. The fact is, however, that "every empirical study of the question has reach conclusions that, to say the lease, fail to support the claim that punitive damages have grown dramatically in both frequency and size." Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort System -- And Why Not?*, 104 U. Pa. L. Rev. 1147, 1254 (1992); *see also* Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes With Empirical Data*, 78 Iowa L. Rev. 1, 24 (1992). For an exposition of the overwhelming empirical evidence on this issue, ATLA respectfully refers the Court to the Brief of Amicus Curiae Trial Lawyers for Public Justice.

In this brief, ATLA focuses on an even more disturbing myth propagated by the tort reform campaign, that of the "lawless jury." The civil jury has come under increasingly harsh attack by those who are frequently defendants in tort suits. *See* Stephen Daniels, *The Question of Jury Competence: The Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda Building*, 52 Law and Contemp. Probs. 269, 279-92 (1989); Kevin M. Clermont and Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 Cornell L. Rev. 1124, 1125-29 (1992); Kenneth J. Chesebro, Galileo's Retort: *Peter Huber's Junk Scholarship*, 42 Am. U. L. Rev. 1637, 1696-1705 (1993).

In the case at bar, Honda contends that "it is beyond dispute that juries often base their verdicts on extra-legal considerations and may be led astray by bias, by naked redistributionist impulses, by misunderstanding of the law, or by many other influences or deficiencies which should be unacceptable in our system of justice." Pet. Br. at 9. "It has long been a commonplace that juries, bedaled by evidence of the size and financial condition of a wrongdoer and feeling 'antipathy to a wealthy, out-of-state corporate defendant' may surrender to 'redistributionist impulses.'" Pet. Br. at 25.

ATLA addresses the single question presented by Honda: whether the Due Process Clause requires states to protect corporate defendants from juries by adopting rules that permit new trials where the court finds that a jury award is excessive. Although Honda's argument is addressed to both compensatory and punitive damages, this brief focuses its attention on judicial review of punitive damage awards. If, as ATLA contends, there is no federal constitutional right to new trial or remittitur on the ground that a punitive award is excessive, ATLA suggests that a similar result necessarily obtains with respect to compensatory damages.

II. HISTORY AND ACCEPTED PRACTICE DEMONSTRATE THAT REMITTITUR IS NOT A FUNDAMENTAL RIGHT REQUIRED BY THE DUE PROCESS CLAUSE.

A. Oregon's Denial of New Trial on the Basis that Damages are Against the Weight of the Evidence is not Unique.

At the outset, it is worth defining precisely what Honda demands of the State of Oregon. Although Honda's Question Presented uses the term "excessiveness review," it is clear that Honda refers specifically to a rule which "gives trial judges the authority to grant new trials, or to condition the denial of a new trial on a plaintiff's acceptance of a remittitur, when the judge concludes that excessive damages have been awarded." Pet. Br. at 16. The rule Honda seeks would permit "new trials in cases where juries returned verdicts against the weight of the evidence." Pet. Br. at 12.

Under this type of review, the size of the award in relation to the evidence is itself sufficient reason for the court to brand it "excessive." In this case, for example, Honda contended that the amount of punitive damages was too high in view of the type of misconduct, the amount of economic damages, other punitive damage awards in Oregon, and analogous criminal fines. Pet. Br. at 6-7. It is this type of "excessiveness" review, "to re-examine the evidence and set aside a verdict because it [is] excessive or in any other respect against the weight of the evidence," that the Oregon Court prohibited in *Van Lom v. Schneiderman*, 210 P.2d 461, 465 (Or. 1949), *quoted* in Pet. Br. at 3.

A separate species of "excessiveness" review was set forth in former O.C.L.A §5-802, subd. 5, permitting new trial on the basis of "Excessive damages, appearing to have been

given under the influence of passion or prejudice." Under this type of judicial review, the court's focus is not on the amount of damages, but on some irregularity, misconduct or corruption on the part of the jury. However, an extraordinarily large verdict might be indicative of passion or prejudice. *Van Lom* did not invalidate this basis for new trial.

> Prior to oral argument we asked counsel to brief the following question: "Can a valid distinction be made with respect to the application of Article VII, Section 3, between the power to grant a new trial on the ground of damages which are merely excessive and on the ground of excessive damages appearing to have been given under the influence of passion and prejudice?"

210 P.2d at 468. The court acknowledged that its prior rulings were not consistent on this question. Since there was no indication of passion or prejudice in the case before it, the *Van Lom* court's conclusion was to "deem it inappropriate to discuss the question above stated and leave [it] for future consideration . . ."

It does not appear that the Oregon Court squarely addressed this question thereafter. In *Noteboom v. Savin*, 326 P.2d 772 (Or. 1958), the court indicated that an appellate court cannot set aside a verdict as excessive unless such verdict is clearly the result of passion or prejudice in a jury trial. In 1980, the court of appeals suggested that availability of passion-and-prejudice review remained an open question. *Trenery v. Score*, 609 P.2d 388, 390 (Or. Ct. App. 1980). At the same time, it appears that trial courts were reviewing punitive damage verdicts on that basis. *See, e.g., Stafford v. Garrett*, 613 P.2d 99, 101 n.4 (Or. App. 1980)(plaintiff alleged error in trial court's grant of new trial on grounds of

excessive damages through passion and prejudice; the court did not reach the issue).

Although the current version of the rules no longer contains the phrase "passion or prejudice," a fair reading suggests that a party with evidence of such improper conduct on the part of the jury could seek a new trial under O.R.C.P 64B(1)("Irregularity in the proceedings of the . . . jury . . . by which such party was prevented from having a fair trial.") or under O.R.C.P 64B(2)("Misconduct of the jury . . ."). As indicated above, the Oregon Supreme Court has not held that Art. VII, §3 precludes such review. To the extent that the law of Oregon is unclear or unsettled on this point, ATLA suggests, this Court should refrain from subjecting it to federal constitutional scrutiny.

Oregon's position, declining to grant new trials on the basis of mere excessiveness, but allowing new trials on the basis of passion and prejudice or other jury misconduct, is hardly unique or "freakish" with no analog in the law of other jurisdictions." Pet. Br. at 17. Indeed, "Most courts require a finding that the jury was activated by passion or prejudice, improper motives or matters outside the record, before the jury verdict may be disturbed by remittitur." 2 James D. Ghiardi and John J. Kircher, Punitive Damages Law and Practice §18.07 at 27 (1989). *See also* Linda L. Schlueter and Kenneth R. Redden, Punitive Damages 8 (2d. ed. 1989)("Generally such [a punitive damage] award will not be overturned unless the defendant can show that there was an abuse of discretion such as the jury award was based on passion or prejudice.").

A recent annotation includes Oregon among 21 states whose "courts have adopted the view that the amount of punitive or exemplary damages awarded in an action involving personal injury or death is left to the sound

discretion of the trier of fact and absent a showing of passion or prejudice such award will not be set aside on the grounds of excessiveness or inadequacy." Jane Massey Draper, Annotation, *Excessiveness or Inadequacy of Punitive Damages Awarded in Personal Injury or Death Cases*, 12 ALR 5th 195, 273 (1993)(citing decisions from Alabama, Arizona, California, Colorado, Connecticut, Delaware, Illinois, Louisiana, Minnesota, Missouri, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, West Virginia, and Wisconsin).

ATLA suggests that Oregon's limited judicial review of damage awards does not "so depart from an accepted norm as to be presumptively violative of due process." Pet. Br. at 12, *quoting TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2720 (1993).

B. Historical Acceptance of Excessiveness Review Does Not Establish It as a Fundamental Right.

1. Excessiveness review is not "Deeply Ingrained" in Anglo-American Law

Honda's resort to history is similarly flawed. Honda asserts: "As long ago as the mid-seventeenth century, English courts granted new trials in cases where juries returned verdicts against the weight of the evidence, and the practice was settled in all English courts by the mid-eighteenth century." Pet. Br. at 12-13 "In the years prior to the adoption of the Fourteenth Amendment the same principle was applied by state courts across the country." *Id.* at 15.

Honda is simply wrong on the historical record. The fact is that before American independence, the common-law courts of England did not grant new trials for excessive damages in tort actions. In 1764, one English court declared

that "there is not one single case (that is law) in all the books to be found, where the Court has granted a new trial for excessive damages in cases for torts." *Beardmore v. Carrington*, 95 Eng. Rep. 790, 793 (C.P. 1764). Most of the cases cited by Honda involve new trials for reasons of jury bribery or corruption. For a detailed exposition of both English and early American decisions, clearly demonstrating their extreme reluctance to review jury damage awards in personal injury cases, ATLA respectfully refers the Court to the Brief Amici Curiae of Legal Historians.

Indeed the recognition of punitive damages was itself prompted by the conviction held by English jurists that they were not permitted to reduce jury verdicts that appeared to exceed amounts required for full compensation. *See* 1 James D. Ghiardi and John J. Kircher, Punitive Damages Law and Practice §§1.01 and 1.02 (1989). Linda L. Schlueter and Kenneth R. Redden, Punitive Damages 8 (2d. ed. 1989).

The doctrine of punitive damages was first articulated explicitly in *Wilkes v. Wood*, 95 Eng. Rep. 768 (C.P. 1763), in which an official illegally searched the house of the publisher of a pamphlet which criticized King George III and illegally seized his property. In a companion case, *Huckle v. Money*, 2 Wils. 206, 95 Eng. Rep. 768 (K.B. 1763), Lord Camden upheld "exemplary damages," recognizing that the jury's unfettered discretion in awarding damages was firmly rooted in English legal tradition. John Wilkes, the publisher, became something of a celebrity among the colonists, and there is some indication that they were aware of these punitive damage awards when the Seventh Amendment was drafted and ratified. *See* Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 156-58 (1991).

In nineteenth century America, punitive damage awards were reviewed with great deference to the role of the jury. Decades before the Fourteenth Amendment was drafted, this Court recognized that punitive damages were "a well established principle of the common law" in which the determination of the amount "has always been left to the jury, as the degree of punishment to be inflicted must depend on the peculiar circumstances of the case." *Day v. Woodworth*, 54 U.S. (13 How.) 336, 371 (1851); *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 521 (1885)("The discretion of the jury in such cases is not controlled by any very definite rules; yet the wisdom of allowing such additional damages is attested by the long continuance of the practice."); *Barry v. Edmunds*, 116 U.S. 550, 565 (1886)("nothing is better settled than that, in such cases . . . it is the peculiar function of the jury to determine the amount by their verdict.").

2. Even After Wide Acceptance in American Courts, Excessiveness Review Has Not Been Regarded As Fundamental to Due Process.

Petitioner states, quoting from this Court in *Shad v. Arizona*, 111 S. Ct. 2491, 2501 (1991), "What has been regarded as fundamental . . . from time immemorial" is a 'concrete indicator of what fundamental fairness and rationality require.'" Brief at p.9. ATLA respectfully suggests that excessiveness review, even where permitted, is not regarded as a fundamental right.

Justice Story, who is credited for initiating the use of remittitur in the United States in *Blunt v. Little*, 3 F. Cas. 760 (C.C.D. Mass. 1822), realized that the practice of "interfering with the verdict" required him to "go to the very limits of the law." 3 F. Cas. at 762. He was referring, of course, to the Seventh Amendment. *See* I. Sann, *Remittiturs (and Additurs) in the Federal Courts: An Evaluation with Suggested*

Alternatives, 38 Case Western Reserve L. Rev. 157, 169 (1987-88).

This Court, reviewing the history of remittitur practice in *Dimick v. Schiedt*, 294 U.S. 474, 480 (1935), observed that Mayne, in his Treatise on Damages, made clear that "it was always admitted that in cases where the amount of damages was uncertain their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it." The Court concluded that "Recent English decisions fully confirm this view in respect of the common-law rule as it existed at the time of the adoption of the Constitution." *Id.*

Noting these rather tenuous roots of the doctrine of remittitur prior to the adoption of the Seventh Amendment, this Court gave only reluctant approval to the practice in *Dimick*. The Court referred to the federal acceptance of remittitur as a "doubtful precedent" that should "not [be] extended by mere analogy" to additur. *Id.* at 485. After explicitly stating its reservations, the Court stated:

> In the last analysis, the sole support for the decision of this court and that of Mr. Justice Story, so far as they are pertinent to cases like that now in hand, must rest upon the practice of some of the English judges --- *a practice which has been condemned as opposed to the principles of the common law by every reasoned English decision, both before and after the adoption of the Federal Constitution*, which we have been able to find. In the light reflected by the foregoing review of the English decisions and commentators, it therefore may be that, if the question of remittitur were now before us for the first time, it would be decided otherwise. But, first announced by Mr. Justice Story in 1822, the doctrine has been accepted as the law for more than a hundred years and

> uniformly applied in the federal courts during that time. And, as it finds some support in the practice of the English courts prior to the adoption of the Constitution, we may assume that in a case involving a remittitur, which this case does not, the doctrine would not be reconsidered or disturbed at this late day.

Id. at 484-85 (emphasis added). There is not a hint by the Court that the practice of ordering a new trial based on excessive damages even approaches the level of fundamental right, despite its longstanding practice in federal courts.

C. The Right to Trial By Jury, Not the Right to Control the Jury, Is Fundamental In the American System of Justice.

Honda's attempt to elevate judicial review of jury damage awards to a fundamental right suffers from a more basic fallacy. This Court in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 15-16 (1991) held that the common law procedure for assessing punitive damages has been so widely accepted for so long that it presumptively comports with due process. Honda erroneously extends this principle to state that historically practiced procedures are *required* by due process.

This Court has made it clear that the Due Process Clause protects only fundamental rights. Fundamental rights are those which are "explicitly or implicitly guaranteed by the Constitution." *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1972). "Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Dowling v. United States*, 493 U.S. 342, 352 (1990).

This Court has repeatedly declined to elevate procedural rules, despite their importance to litigants, to the status of constitutional rights. "It has never been thought that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure." *Spencer v. Texas*, 385 US 554, 564 (1967), *accord, Estelle v. McGuire*, 112 S Ct. 475, 481 (1992). In civil cases, too, the Fourteenth Amendment does not impose "a rigid constitutional code of procedural necessities." *Walter v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 326 (1985).

Honda attempts to circumvent this principle by means of an astonishing exercise in historical revisionism. Citing Holdsworth, Honda states that the history of the jury "is in large part a chronicle of attempts [by the courts] to implement 'some regular method of controlling the verdicts of juries.'" Pet. Br. at 11. Without this control by the courts, the jury "would never have won [its] popularity. *Id.* Therefore, Honda reasons, it is not the jury trial, but "the practice of providing judicial excessiveness review of damages verdicts [that] is deeply rooted in English and American law." *Id.*

The fact is that Americans enjoy the right to trial by jury because it is guaranteed to them by the U.S. Constitution and the constitutions of nearly every state. *See* Paul B. Weiss, Comment, *Reforming Tort Reform: Is There Substance to the Seventh Amendment?*, 38 Cath. U.L. Rev. 737, 739 n.11 (1989)(citing 48 state constitutional provisions). Judicial attempts to control the verdicts of juries were bitterly hated by the colonists and new citizens under the Articles of Confederation. When the opportunity arose, they placed the

most secure restraint at their disposal, in the form of a constitutional guarantee, on judges, not juries.[2]

As a result the "right of trial by jury in civil cases at common law is fundamental to our history and jurisprudence." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 338 (1979)(Rehnquist, C.J., dissenting). In addition, "the scope and effect of the Seventh Amendment . . . perhaps more than with any other provision of the Constitution, are determined by reference to the historical setting in which the Amendment was adopted." *Id.* at 339.

A primary grievance of the American colonists was the extensive effort by England to shift the adjudication of civil and criminal disputes from colonial courts, where local juries sat, to Vice-Admiralty courts and other non-jury tribunals administered by judges beholden to the Crown. Roscoe Pound, The Development of Constitutional Guarantees of Liberty 69-72 (1957); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 654 (1973); *Parklane Hosiery, supra*, 439 U.S. at 340 (Rehnquist, C.J., dissenting); *Chauffeurs, Teamsters and Helpers, Local No.391 v. Terry*, 110 S. Ct. 1339, 1353 (1990)(Brennan, J., concurring). The colonists complained of this infringement through the Stamp Act Congress, the Continental Congress, and, finally, in the Declaration of Independence ("For depriving us in many cases, of the benefits of Trial by Jury"). Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History*, 44 Hastings L.J. 579, 595-97 (1993).

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2 In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

U.S. Const., amend vii.

Independence from England did not diminish the sacredness of the jury in the eyes of the new Americans. The absence in the proposed Constitution of an express guarantee of the right to trial by jury in civil actions was condemned by the Antifederalists as sufficient cause to reject the entire Constitution. Their demand for an explicit guarantee of the right to trial by jury led to the adoption of a Bill of Rights as a condition to ratification of the constitution itself. Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 295-98 (1966); Wolfram, *supra*, at 667-730 (extensive review of ratification debates); Landsman, *supra*, at 599.

Those who fought so strenuously for this right in 1791 saw the jury as an essential element of limited, democratic government. The jury was intended as a check on the power of the federal judiciary. Morris S. Arnold, *A Historical Inquiry Into the Right to Trial By Jury in Complex Civil Litigation*, 128 U. Pa. L. Rev. 829, 832-35 (1980). Reacting to their experiences at the hands of autocratic British judges,

> The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343 (Rehnquist, C.J., dissenting). *See also Granfinanceira, S.A. v. Nordberg*, 492 U.S. 33, 83 (1989)(White, J., dissenting)("The function of the civil jury is to diffuse the otherwise autocratic power and authority of the judge").

In addition, the new Americans regarded juries "as more than a 'mode of trial'; they were instruments of local

government as well." Arnold, *supra*, at 833. *See also*, Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 144-49 (1991). The fact that juries would arrive at different results than judges was a truism for the drafters of the Seventh Amendment, particularly in disputes between the wealthy and the common person. In those cases, it was the drafters' conviction that the judgment of the jury would be more accurate. *Id.* at 147. In any event,

> [N]o amount of argument that the device provides for more efficiency or more accuracy or is fairer will save it if the degree of invasion of the jury's province is greater than allowed in 1791. To rule otherwise would effectively permit judicial repeal of the Seventh Amendment . . .

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 348 (Rehnquist, C.J., dissenting).

In view of this history the Supreme Court has consistently emphasized the fundamental nature of the right to jury trials and has viewed any curtailment with great disfavor. Describing the right to trial by jury as "a great constitutional right," the Court stated that "it is only in exceptional cases and for specific causes that a party may be deprived of it." *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872). *See also, Bailey v. Central Vermont Ry.*, 319 U.S. 350, 354 (1943) ("The right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence"); *See also, Jacob v. New York*, 315 U.S. 752, 753 (1943) ("The right of jury trial in civil cases at common law . . . should be jealously guarded by the courts"); *Lyon v. Mutual Benefit Assoc.*, 305 U.S. 484, 492 (1939) ("It is essential that the right to trial by jury be scrupulously safeguarded").

The Court has repeatedly emphasized that

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486 (1935), *quoted* in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959); and in *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 110 S. Ct. 1339, 1344-45 (1990).

The history of the jury in America, ATLA submits, is a chronicle of *resistance* to judicial control of jury verdicts. *This* is the "deeply-ingrained tradition" of American law.

III. THE MATHEWS TEST DOES NOT REQUIRE THE STATES TO PROVIDE NEW TRIALS ON GROUNDS OF EXCESSIVE DAMAGES AS A MATTER OF PROCEDURAL DUE PROCESS.

A. Mathews Does Not Supply the Appropriate Test in Determining Whether Full Judicial Proceedings Comport with Due Process.

Honda suggests that "in analyzing the constitutional adequacy of such novel state procedures . . ., the Court makes use of the familiar three-part test articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) . . .". Brief at p. 18.

At the outset, ATLA submits that *Mathews v. Eldridge* does not provide the appropriate due process standard in this case. *Mathews* has been applied to administrative proceedings and other proceedings that do not provide the full panoply of

protections of a full trial. *Medina v. California*, 112 S. Ct. 2572 (1992), held that *Mathews* does not provide the appropriate framework for assessing state procedural rules which are part of the criminal process. "[B]ecause the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area." *Id.* at 2577. The Court concluded that the appropriate approach was the much narrower and less intrusive test set forth in *Patterson v. New York*, 432 U.S. 197, 202 (1977)(whether the challenged rule "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental.").

This case comes to this Court following a full judicial trial by jury applying state tort law. If there is any area of law that is peculiarly within the expertise and experience of the states, it is the law of torts. ATLA respectfully submits that the Patterson test is the appropriate standard by which to determine whether Oregon's new trial rules violate procedural due process. ATLA submits that the discussion in Part II, *supra*, demonstrates that excessiveness review is not "so rooted in the traditions and conscience of our people as to be ranked fundamental."

Even if this Court should apply the *Mathews* balancing test, it is clear that none of the factors weighs in favor of requiring states to adopt excessiveness review. *Mathews* requires

> consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's

interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews v. Eldridge, 424 U.S. 319, 336 (1976).

B. The Interest of Litigants in Private Suits For Money Damages is Not Weighty.

Honda argues that its interest at stake is great since punitive damage verdicts can be large. Pet. Br. at 19-20. This misperceives the nature of this Court's hierarchy of protected interests. Honda's property interest is, constitutionally speaking, slight. In applying the *Mathews* analysis, this Court has dealt with a spectrum of private interests. Appropriately, the greatest weight is accorded to the loss of physical liberty. *Santosky v. Kramer*, 455 U.S. 745, 756 (1982). Property interests, particularly "mere loss of money," *Addington v. Texas*, 441 U.S. 418, 425 (1979), are far less substantial. "The typical case involving a monetary dispute between private parties" lies at the "end of the spectrum." *Id.* at 423.

This Court has also pointed out that "while private parties may be interested intensely in a civil dispute over money damages," society has "minimal concern with the outcome." *Santosky, supra*, 455 U.S at 756. *See also In re Winship*, 397 U.S. 358, 371 (1970) (Harlan concurring) ("In civil cases, we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor.")

C. Honda Fails to Establish Substantial Risk of Erroneous Deprivation and the Value of Substitute Safeguards.

1. Honda Fails to Establish Inherent Unreliability or Prejudice of Juries

Honda claims that "it is simply indisputable that a very substantial percentage of punitive jury awards are excessive and thus legally erroneous." Pet. Br. at 29. Substantiation for this "indisputable" proposition is conspicuously thin. The "work of social scientists" Honda places before this Court consists of several very limited studies which do not support the propositions Honda assigns to them.

As proof that juries "apply evidence incorrectly and award compensation for expenses they were not supposed to consider," Honda cites M. Selvin and L. Pincus, The Debate Over Jury Performance: Observations from a Recent Asbestos Case (1987). Pet. Br. at 10-11. In that study, researchers interviewed jurors from a single case involving four workers suffering from asbestos disease. Actually, the researchers found that the jurors conscientiously calculated each item of damages for each plaintiff (lost earnings, medical expenses, pain and suffering) and arrived at a total for each. However, they included past medical expenses, which the trial judge had instructed them not to include. *Id.* at 55. This finding hardly stands as a ringing indictment of the civil jury.

To prove bias against corporate defendants, Honda cites a relatively brief article by an assistant professor of psychology, Edith Greene, *On Juries and Damage Awards: The Process of Decisionmaking*, 52 Law & Contemp. Probs. 225 (1989). The author performed no empirical research; the article surveys the results of other studies. Only one study dealt with punitive damages. Kaplan and Miller, *Group Decisionmaking and Normative Versus Informational Influence: Effects of Type of Issue and Assigned Decision Rule*, 52 J. Personality & Soc. Psychology 306 (1987). That study was designed to illustrate group decisionmaking

dynamics, not whether jurors are biased. Professor Greene speculates that jurors are occasionally biased against corporations, but cites no study for that proposition.

Honda also cites A. Chin and M. Peterson, Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials 42-45 (1985). The researchers found that in personal injury cases in Cook County, juries tended to return larger verdicts against corporate defendants than against individuals for the same injuries. However, the researchers did not interview the jurors to ascertain if this divergence was due to anti-corporation bias. Moreover, they concede that the study did not account for liability issues: Defendants in "high-stakes" products liability cases, who are nearly always corporations, were compared to defendants in auto accident cases, generally individuals. They also suggest that settlement strategies might also explain the variations. *Id.* at vi and 58.

With respect to punitive damages, the fact corporations might be subjected to higher verdicts essentially restates the obvious. Corporate misconduct typically threatens a larger number of people and a larger punitive award may be necessary to punish and deter a large corporation. Exceedingly few individual defendants, for example, possess Honda's net worth of $5 billion or engage in conduct that threatens the safety of hundreds of thousand of consumers.

Honda also appends to its brief a long list of appellate decisions holding punitive damage verdicts excessive. This demonstration borders on the irrelevant precisely because, as Honda states, the vast majority of states delegate broad discretion to juries, leaving it to judges and appellate courts to apply more specific guidelines. Reduction of verdicts does not indicate jury bias or disregard of instructions; it is an intended feature of the process. Nor does Honda justify its assumption that the judicially determined quantum of

damages is necessarily the "correct" one. Viewing punitive damages as "expressive of the community attitude towards one who wilfully and wantonly causes hurt or injury to another," *Home Insurance Co. v. American Home Prods. Corp.*, 550 N.E.2d 930, 934 (1990), ATLA suggests that the judgment of jurors drawn from the community provides a more accurate mirror of community attitudes.

In this regard, Honda wholly ignores the second part of this *Mathews* element: the value of the additional safeguards Honda seeks. Petitioner does not demand that the amounts of all punitive damage awards be determined by judges, but rather the opportunity for a new trial. Honda's due process argument is premised on the notion that juries are biased against out of state corporations, are swayed by sympathy and disregard instructions. Honda does not explain how placing the case in the hands of a second jury will substantially improve the fairness of the process.

It may also be worth noting that judges are not immune from the same pressures. An illuminating remark is made by Judge Richard Neely, of the West Virginia Supreme Court of Appeals, whose opinion was recently before this Court in *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993):

> As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because in-state plaintiffs, their families and their friends will reelect me.

Richard Neely, The Product Liability Mess 4 (1988).

2. The American Jury Works Well.

Contrary to Honda's assertion, Americans who serve on juries do their job quite well. The largest empirical study of actual jury performance, sponsored by the Roscoe Pound Foundation, found that:

> Juries overwhelmingly take their duties seriously . . . Juries are evidence-oriented . . . with the personalities of the participants in the trial and other subsidiary matters only of minor concern to them . . . Juries as a group apparently also understand enough of the law that they are able to arrive at legally supportable verdicts in a very large majority of cases . . . The evidence also strongly suggest that jurors rarely increase the size of an award because they think the defendant has ample insurance to cover it, nor do they ordinarily make awards out of sympathy.

John Guinther, The Jury in America 102 (1988). Guinther concludes that "juries are, on the whole, remarkably adept as triers of fact. Virtually every study of them, regardless of research method, has reached that conclusion." *Id.* at 230.

Recent empirical studies confirm this picture of the American civil jury. A study of jury awards of noneconomic damages which, like punitive damages, permit broad discretion on the part of the jury, compared jury awards to the amounts that judges and professional arbitrators would award. The researchers found that "damages awarded for pain and suffering and disfigurement and the rationales behind the awards did not differ between the two sets of decisionmakers." The authors concluded that "the data lend no support to the widely held view that jurors are more generous than judges or arbitrators in awarding noneconomic damages." Neil Vidmar and Jeffrey Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A*

Comparison of Jurors with Legal Professionals, 78 Iowa L. Rev. 883 (1993).

Another recent study compared verdicts rendered by juries with those rendered by judges in bench trials. The researchers observed that in products liability cases, plaintiffs tended to prevail more often on liability and received higher awards judges than from juries. Kevin M. Clermont and Theodore Eisenberg, *Trial by Judge or Jury: Transcending Empiricism*, 77 Cornell L. Rev. 1124, 1138-41 (1992).

Another study focusing on juror attitudes found that jurors tended to be concerned with the social costs of large awards and to be more skeptical of plaintiffs than of business defendants. Valerie Hans, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 Law and Socy Rev. 85, 93 (1992).

For a more thorough analysis of these and other empirical studies, ATLA respectfully refers the Court to the Brief of Amicus Curiae Trial Lawyers for Public Justice.

No one would claim that juries never render verdicts based on improper considerations. However,

> [T]he Clause does not require that the procedure used to guard against an erroneous deprivation . . . be so comprehensive as to preclude any possibility of error . . . [rather] procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.

Walters v. National Assoc. of Radiation Survivors, 473 U.S. 305, 320-321 (1985).

D. Governmental Interest Weighs Against Imposing New Trial Rules on the States.

Honda suggests that any additional procedures required would not be burdensome to the government since other states already provide remittitur. This argument might well be made to the Oregon Supreme Court in seeking a change in state law. In this Court, however, Honda seeks to open up an entirely new field of federal constitutional law devoted to scrutinizing the civil procedures of the states. Should the Court adopt Honda's view, every defendant, having exhausted review provided by state law, will be entitled to raise due process arguments that the type of remittitur provided by the state is not sufficiently favorable, or that rules governing new trials, directed verdicts, verdict impeachment, or other procedures do not adequately protect their due process rights against wayward juries. This Court will be in the position of micro-managing this effort to constitutionalize each state's procedural rules.

IV. THE CONSTITUTIONALIZING OF STATE TORT LAW VIOLATES PRINCIPLES OF FEDERALISM AND THE TENTH AMENDMENT.

A. Review of Punitive Damage Awards for Excessiveness is a Matter of State Law

Punitive damages "have long been a part of traditional state tort law." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984)(upholding a $10 million punitive damage award). This Court has already declined to impose on the States the type of review sought by Honda, focusing on comparison between the punitive award and economic damages, other awards, and criminal penalties, Pet. Br. at 6-7. In *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S.

Ct. 2909, 2922 (1989), Part IV of the majority opinion, in which all members of the Court concurred, states:

> Although petitioners and their *amici* would like us to craft some common-law standard of excessiveness that relies on notions of proportionality between punitive and compensatory damages, or makes reference to statutory penalties for similar conduct, these are matters of state, and not federal common law. Adopting a rule along the lines petitioners suggest would require us to ignore the distinction between the state and federal law issues. For obvious reasons we decline that invitation.

B. A Mandate Requiring Oregon to Overrule Its Own Interpretation of Its Constitution and Amend Its Rules of Civil Procedure Would Violate the Tenth Amendment

The Tenth Amendment of the Constitution of the United States stands as a substantive limit on federal power to intrude into the sovereign sphere of the states.[3] This limit was viewed as an essential feature of the federalist system by the drafters of the Constitution. Indeed, eight states ratified the Constitution only on condition that their proposed bills of rights be considered after ratification, and every one of these included a version of 10th amendment. *See Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 569 (1985)(Powell, J., dissenting); Laurence Tribe, American Constitutional Law 568-70 (2d ed. 1988).

This Court has proclaimed that "The [Tenth] Amendment declares the constitutional policy that Congress

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[3]"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., amend. X..

may not exercise power in a fashion that impairs the States' integrity, or their ability to function effectively in a federal system." *Fry v. United States*, 421 U.S. 542, 546 n.7 (1975). Hence, this Court suggested in *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 633 (1874), that, even if the commerce clause would allow it, Congress may not have the power to authorize the Supreme Court to supplant state courts as the authoritative declarers of law within their jurisdictions by functioning as a court of last resort with respect to state common law and statutory law. Professor Tribe concludes from dicta in *Griffin v. Breckenridge*, 403 U.S. 88, 102, 104 (1971), that "Congress may not have the power to use its commerce clause or thirteenth and fourteenth amendment authority wholly to federalize such traditional areas of common law as the law of torts or of contracts." Tribe, *supra*, at 380.

National League of Cities v. Usery, 426 U.S. 833 (1976) held that Congress could not impose the federal minimum wage requirement on the states as employers. The Court held that "Congress may not exercise that power [to regulate commerce] so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." *Id.* at 855. ATLA submits that a states' procedural rules governing new trials, particularly where they reflect the interpretation of the state constitution by the highest court of the state, is an integral governmental function of the state. ATLA further submits that the limitation on federal power to dictate to the States in such areas applies to the judicial as well as the legislative federal branch.

National League of Cities, of course, was overruled in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). However, the Court did not intend in *Garcia* to leave state interests bereft of constitutional

protection. Rather, the interests of the states "are more properly protected by the procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.* at 552. Specifically, the fact that the constitution provides for direct representation of the states in Congress, means that the states can, and in fact have exercised considerable influence over legislation. This, the Court held, was the primary means chosen by the Founders to protect state sovereignty. *Id.* at 552-56.

The Court suggests at the close of its opinion in *Garcia* that there are "affirmative limits the constitutional structure might impose on federal action affecting the States" where the political process has not performed as intended. *Id.* at 556; *see also Id.* at 564 n.7 (Powell, J., concurring).

Honda asks this court to overrule the Oregon Supreme Court's interpretation of the Oregon Constitution and amend the Oregon Rules of Civil Procedure. The political process providing representation of Oregon in the Congress, of course, is of no avail in this situation. ATLA suggests that, at the very least, the possible collision with the Tenth Amendment guarantee of principles of federalism counsels against such direct interference in a State function so integral to sovereignty and historically relegated to the States.

In recent decisions, this Court has emphasized the importance of deference to state sovereignty in our system of federalism. *See Coleman v. Thompson*, 111 S. Ct. 2546, 2552 (1991)(comity and federalism require federal courts entertaining habeas corpus petitions to accord a full measure of respect to state procedural rules under the adequate state ground doctrine); *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991)(Federal Age Discrimination in Employment Act does not preempt mandatory retirement provision for judges contained in state constitution).

In *Gregory v. Ashcroft*, Justice O'Connor's majority opinion featured a compelling essay on the vitality of states' rights, not as the mere absence of federal interference, but as a positive value essential to self-government. *Id.* at 2399. Moreover, the "'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties,'" *Id.* at 2400. quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). ATLA suggests that the right to trial by jury is one such fundamental liberty.

* * *

At the very heart of Honda's arguments is a myth: The lawless jury. Two centuries of jurisprudence and extensive recent empirical research flatly contradict Honda's dark and cynical portrait of our civil justice system. The myth is wrong. Due process of law finds no higher expression than in the independent civil jury.

CONCLUSION

For these reasons, Amicus urges this Court to affirm the judgment of the Supreme Court of Oregon

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April 1, 1994

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD.;
AND AMERICAN HONDA MOTOR CO., INC.,

Petitioners,

v.

KARL L. OBERG,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OREGON

BRIEF OF LEGAL HISTORIANS
DAVID E. CHESTEKOFF, MARK W. HAGER,
BRUCE H. MANN, AND ARTHUR F. McEVOY
AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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March 31, 1994

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IDENTITY AND INTEREST OF *AMICI CURIAE*

This brief is being submitted in support of Respondent by the following legal historians:[1]

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We submit this brief in order to correct the oversimplified and misleading version of the history of judicial review of damages awards described in the Brief of Petitioners Honda Motor Co., *et al.* ("Pet. Br."). It is simply not true that the practice of providing judicial review of the size of all damages

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[1] Consent letters have been filed with the Clerk of this Court.

verdicts, "whether punitive or compensatory," to determine whether they were "excessive or in any other respect opposed to the weight of the evidence," was "well entrenched," Pet. Br. at 3, 12, 16, either at common law or in the United States prior to the framing of the Fourteenth Amendment. The pattern of judicial review was much more limited than Honda describes, and such review was extremely deferential in punitive damages, personal injury, and other cases involving difficult-to-quantify damages. There is no basis for Honda's conclusion that weight-of-the-evidence excessiveness review was a fixture of the common law.

SUMMARY OF THE ARGUMENT

Honda argues that due process requires judicial review "'to re-examine the evidence [before the jury] and set aside a verdict because it [is] excessive or in any other respect opposed to the weight of the evidence.'" Pet. Br. at 3 (citation omitted). Honda claims such a right on the ground that "[b]y the mid-eighteenth century English courts *routinely* set aside excessive damage awards returned by juries; the same approach was uniformly followed by state courts in this country prior to the ratification of the Fourteenth Amendment." *Id.* at 8 (emphasis added). Honda concludes that "Oregon's decision to withhold a safeguard that has been regarded as fundamental in all other Anglo-American jurisdictions from time immemorial must be held to run afoul of the Due Process Clause." *Id.* at 9.

Honda has misread the relevant history. Judicial review to decide whether a punitive damage award in a personal injury tort case is "excessive" insofar as it is against the weight of the evidence was assuredly *not* a safeguard that has been regarded as "fundamental" in Anglo-American jurisdictions "from time immemorial." The reality is precisely the contrary: such review was not available in common-law England; was not available in the United States at the time of the framing of the Fifth Amendment (which of course contains its own Due Process Clause); and was not widely accepted practice among the States when the Fourteenth Amendment was adopted in 1868.

A. Before American independence, common-law courts in England did not grant new trials for excessive damages in tort cases. An English court was able to say in 1764 that "there is not one single case (that is law) in all the books to be found, where the Court has granted a new trial for excessive damages in cases for torts." *Beardmore v. Carrington*, 95 Eng. Rep. 790, 793 (C.P. 1764). The cases on which Honda relies involved jury bribery and other forms of corruption, not simply excessive damages.

B. It is true that, in the last part of the eighteenth century and at the beginning of the nineteenth, the English courts, led by Lord Mansfield, began to assert an increasing ability to control the jury by granting new trials. But this power was ordinarily not employed in punitive damages cases, tort cases, and in other proceedings involving difficult-to-measure damages that required the jury to make qualitative judgments based on all the relevant facts of the case. Even so, the American colonists deeply resented judicial control over the jury and cited such perceived "tyranny" as a primary factor in their grievances against England. Accordingly, the Fifth Amendment was adopted in 1791 against a background assumption that the jury was virtually all-powerful. It was usually vested with ultimate authority in trial courts to decide questions of both law and fact in civil and criminal cases. There is no evidence that any of the framers believed that such procedures were fundamentally unfair or would have violated the Fifth Amendment in the absence of appellate review. Indeed, there was no significant right to appeal in federal criminal cases until the end of the nineteenth century.

C. American practice in the nineteenth century recognized that punitive damages, and other damages in tort cases involving personal injury, were peculiarly within the jury's domain. Accordingly, those cases were subject to extremely deferential review and were reversed, if at all, only when the jury's verdict was so unreasonable or irrational as to suggest that the jury was motivated by passion and prejudice. In fact, the cases that Honda cites in its brief support the *amici's* view of history, rather than Honda's.

ARGUMENT

I. ENGLISH COMMON LAW

Initially, English courts had no power *at all* to grant new trials for perceived "excessiveness" of damages.[2] Gradually they seized such power, but almost exclusively in cases of bribery and other forms of jury corruption. "All or most of the cases of new trials, are where the juries have misdemeaned themselves contrary to their oath; in the case of *[Wood v. Gunston]*, the misconduct of the jury was certainly an ingredient." *Beardmore v. Carrington*, 95 Eng. Rep. 790, 793 (C.P. 1764).[3] *Berks v.*

[2] In *Beardmore v. Carrington*, 95 Eng. Rep. 790 (C.P. 1764), the court explained that "[i]t is clear that the practice of granting new trials is modern and that the Courts anciently never exercised this power. . . . [T]here is not one case to be found in the Year-Books where ever the Court abridged the damages after a principal verdict . . . ." *Id.* at 792.

[3] In *Wood v. Gunston*, 82 Eng. Rep. 867 (Upper Bench 1655), for example, the court observed that "it is frequent in our books for the Court to take notice of miscarriages of juries, and to grant new tryals upon them, and it is for the peoples benefit that it should be so for a jury may sometimes by indirect dealings be moved to side with one party, and not to be indifferent betwixt them"). Thus, with respect to *Wood v. Gunston*, the *Beardmore* court observed that "there is great reason . . . to think [that the grant of a new trial] was for misbehavior of the jury," for "it is highly probable there was some evidence that the jury had been tampered with." *Id.* "[T]his was certainly the very first case of a new trial." *Id.; see also Roe v. Hawkes*, 83 Eng. Rep. 316 (K.B. 1663) ("the new trial was not granted in *Wood and Gunston's case* meerly for the excessiveness of the damages, but because a tampering with the jury was proved").

Similarly, according to *Beardmore*, the new trial in *Ash v. Ash*, 90 Eng. Rep. 526 (K.B. 1701), "was plainly for the misdemeanor of the jury in refusing to answer the Judge when he asked what ground or reason they went upon." *Beardmore*, 95 Eng. Rep. at 793.

In *Gilbert v. Burtenshaw*, 98 Eng. Rep. 1059 (K.B. 1774), Lord Mansfield explained, in denying a rule for new trial in a malicious prosecution action where the jury had awarded £400 in damages, that "[n]ew trials are not to be granted in this class of cases without very strong grounds indeed, and such as carry internal evidence of intemperance in the minds of the jury. It is by no means to be done where the Court may feel, that if they had been on the jury they would have given less damages, or where they might think the jury themselves would have completely discharged their duty, in giving a lesser

Mason, 96 Eng. Rep. 874, 874-75 (K.B. 1756), *Bright v. Eynon*, 97 Eng. Rep. 365, 366, 368 (K.B. 1769), and the other cases on which Honda places primary reliance (Pet. Br. at 13 n.8), did not involve damages issues, and so they offer no support for Honda's assertion that weight-of-the-evidence review of damages for excessiveness was "routine" at common law.[4]

In fact, the *Beardmore* court, in denying a new trial for excessiveness where a jury awarded £1,000 damages for an illegal search and arrest, was able to say in 1764 that "there is not one single case (that is law) in all the books to be found, where the Court has granted a new trial for excessive damages in cases for torts." 95 Eng. Rep. at 793.[5] In *Wilford v.*

sum." *Id.* at 1060.

Contrary to Honda's claim (Pet. Br. at 14 n.9), in *Townsend v. Hughes*, 86 Eng. Rep. 994 (C.P. 1677), the court *refused* to grant a new trial, even though the jury had awarded £4,000 as damages where the defendant had said of the plaintiff: "He is an unworthy man, and acts against law and reason." Chief Justice North explained that "as a Judge he could not tell what value to set upon the honour of the plaintiff, the jury have given four thousand pounds, and therefore he could neither lessen the sum or grant a new trial, especially since by the law the jury are judges of the damages." *Id.* at 994-95. Noting the large verdict in *Townsend*, the *Beardmore* court observed that, "if a Court could not say that those damages were excessive, they can hardly say that damages are excessive in any case of slander whatever." 95 Eng. Rep. at 793.

[4] Even outside the damages context, the practice was that a new trial would not be granted where there was evidence on both sides of the case. *See Hanckey v. Trotman*, 96 Eng. Rep. 1, 1-2 (K.B. 1746); *Anon.*, 95 Eng. Rep. (K.B. 1743); *Ashley v. Ashley*, 93 Eng. Rep. 1088 (K.B. 1740); *Smith v. Huggins*, 93 Eng. Rep. 1089 (K.B. 1740); *Barker v. Dixie*, 95 Eng. Rep. 180, 180-81 (K.B. 1735-36).

[5] The court explained that *Chambers v. Robinson*, 93 Eng. Rep. 787 (K.B. 1726), "seems to be the only case where ever a new trial was granted merely for the excessiveness of damages only; we are not satisfied with the reason given in that case, and think it of no weight, and want to know the facts upon which the Court could pronounce the damages to be excessive. The principle on which it was granted, mentioned in [the reporter], was to give the defendant a chance of another jury: this is a very bad reason; for if it was not, it would be a reason for a third or fourth trial, and would be digging up the constitution by the roots; and therefore we are free to say this case is not law." *Beardmore*, 95 Eng. Rep. at 793.

Berkeley, 97 Eng. Rep. 472 (K.B. 1758), for example, the jury gave £500 in damages against the defendant in a case for criminal conversation. The defendant moved for a new trial on the ground that he was a "clerk in low circumstances" and unable to pay such a sum. But the Court refused to grant even a rule to show cause, "because in cases of tort the jury are the only proper judges of the damages."[6]

Gradually, in the late eighteenth and early nineteenth centuries, English courts became more willing to grant new trials on grounds of damages in certain cases involving easily measured injuries, such as loss of goods with a defined market value.[7] The English courts continued to be quite reluctant to grant new trials for excessive damages in tort cases, particularly those involving

[6] *See also Huckle v. Money*, 95 Eng. Rep. 768, 768 (C.P. 1763) ("the law has not laid down what shall be the measure of damages in actions of tort; the measure is vague and uncertain, depending upon a vast variety of causes, facts, and circumstances; torts or injuries which may be done by one man to another are infinite; in cases of criminal conversation, battery, imprisonment, slander, malicious prosecution, etc., the state, degree, quality, trade or profession of the party injured, as well as the person who did the injury, must be, and generally are, considered by a jury in giving damages. The few cases to be found in the books of new trials for torts, shews that Courts of Justice have most commonly set their faces against them; and the Courts interfering in those cases would be laying aside juries"); *Grey v. Grant*, 95 Eng. Rep. 794, 795 (C.P. 1764) (refusing to grant new trial for excessiveness where £200 was awarded in battery case, and noting that jury "are the proper judges of the damages"); *Tullidge v. Wade*, 95 Eng. Rep. 909, 909 (C.P. 1769) (refusing to grant new trial where jury awarded £50 to father for assault on his daughter, and commenting that, "although the plaintiff's loss in this case may not really amount to the value of twenty shillings, yet the jury have done right in giving liberal damages"); *Bruce v. Rawlins*, 95 Eng. Rep. 934, 934 (C.P. 1770) (rejecting motion for new trial on grounds of excessiveness where £100 was awarded for illegal search, explaining that defendants "know the risk they run by such conduct, and must take the consequences that fall upon them by the verdict of the jury").

[7] *E.g.*, *Sharpe v. Brice*, 96 Eng. Rep. 557, 557 (C.P. 1774) ("the same rule does not prevail upon questions of tort, as of contract. In contract the measure of damages is generally [a] matter of account, and the damages given may be demonstrated to be right or wrong. But in torts a greater latitude is allowed to the jury: and the damages must be excessive and outrageous to require or warrant a new trial").

exemplary damages or injuries to the person.[8] There, the fact that the jury's judgment was intrinsically qualitative and discretionary dissuaded courts from granting new trials in all but the most exceptional cases, such as where the jury's verdict was clearly the result of passion or prejudice.[9]

Thus, in *Duberly v. Gunning*, 100 Eng. Rep. 1226 (K.B. 1792) — which Honda rather surprisingly cites in support of its argument, Pet. Br. at 14 n.9 — the court denied a motion for new trial based on supposedly excessive damages in a criminal conversation case, where the jury had awarded £5,000 even though the plaintiff had apparently consented to the infidelities of his wife and had himself committed adultery. Justice Ashhurst explained:

> Where damages depend in any wise, upon calculation, the Court have some medium to direct them, by which they are enabled to correct any mistake of the jury. But where there is no such light to guide them, where the damages depend upon mere sentiment and opinion, the Court have no line to go by; and therefore it

[8] *E.g.*, *Merest v. Harvey*, 128 Eng. Rep. 761, 761 (C.P. 1814) (denying new trial for excessiveness where jury awarded £500 for hunting game on plaintiff's estate, and explaining that "I do not know upon what principle we can grant a rule in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the Plaintiff may sustain" and adding that "I remember a case where a jury gave £500 damages for merely knocking a man's hat off; and the Court refused a new trial").

[9] *E.g.*, *Fabrigas v. Mostyn*, 96 Eng. Rep. 549, 549 (C.P. 1774) ("[A]s to the excess of damages, the Court were all of opinion, that it was very difficult to interpose with respect to the quantum of damages in actions for any personal wrong. Not that it can be laid down, that in no case of personal injury the damages can be excessive. Some may be so monstrous and excessive, as to be in themselves an evidence of passion or partiality in the jury. In the present case the injury was great, and the jury (not the Court) are to estimate the adequate satisfaction. No prejudice or misbehaviour of any kind are or can be imputed to the jury"); *Leith v. Pope*, 96 Eng. Rep. 777, 778 (K.B. 1782) ("in cases of tort the Court will not interpose on account of the largeness of damages, unless they are so flagrantly excessive as to afford an internal evidence of the prejudice and partiality of the jury").

> would be very dangerous for us to interfere. We have no right in such a case to set up our own judgment against that of the jury, to which the constitution has referred the decision of the question of damages. There is another consideration, deserving of great weight; which is, that the Court [has] never granted a new trial in such a case as this for excessive damages; and yet many instances have occurred where the damages have been confessedly excessive.

Id. at 1228.[10]

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[10] Lord Kenyon added:

> According to my judgment of this case, I think the damages are a great deal too much: nay, I should have been satisfied even if nominal damages only had been given; but as the jury have formed a different judgment upon the evidence, I know not why my judgment should be preferred to theirs upon such a subject. . . . We have known instances of much greater damages than these given in these kinds of cases, which were never got rid of by granting new trials. Knowing therefore no instance in which a new trial has ever been granted in such a case, upon the ground of excessive damages, and the opinion of the Courts having leaned strongly against such interference, even in cases which seemed to call for it as well as this, I confess, although I feel great difficulties on the one side as well as the other, I have not courage enough to make the first precedent of granting new trials under such circumstances as the present.

100 Eng. Rep. at 1228. Justice Grose agreed that "[i]t is material to observe, that there is no instance in which the Courts have ever granted a new trial under such circumstances as the present." *Id.* at 1229. He posed the question:

> But what line have we to go by in declaring that the damages to be too much or too little? We have known many of these cases, where very large damages have been given, particularly one of £10,000 against a person in the situation of a servant. If any thing could have warranted the interference prayed for, we may fairly presume it was that; and yet no new trial was granted.

Id. at 1230. Although Lord Mansfield stated in *Hewlett v. Cruchley*, 128 Eng. Rep. 696 (K.B. 1813), that "it is now acknowledged in all the courts of Westminster-hall that . . . if damages are clearly too large, the Court will send

II. AMERICAN COLONIAL PRACTICE

Around the time of the American Revolution, English judges began to assert greater powers over the jury, and the trend triggered harsh criticism from the colonists. "The award of new trials for any reason [was] regarded with profound suspicion by the revolutionary generation. 'The practice of granting new trials,' a Virginia judge noted in 1786, 'was not a favourite of the courts of England' until the elevation of Lord Mansfield, 'whose habit of controling juries does not accord with the free institutions of this country.'" M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 142 (1977). The jury was held in high regard by the colonists, and the Crown's infringements of the common-law entitlement to jury trial were cited in many of the revolutionary complaints against George III.[11] The controversy surrounding the Constitution's omission of any specific guarantee of the right to trial by jury in civil cases is well known. Professor Wolfram has noted that "the entire issue of a Bill of Rights was precipated at the Philadelphia

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the inquiry to another jury," *id.* at 698, it is significant that Lord Mansfield voted to *deny* a new trial in that case. He stressed that "it is extremely difficult to estimate damages; you may take twenty juries, and every one of them will differ, from £2,000 down to £200. I have always felt that it is extremely difficult to interfere and say when damages are too large." *Id.* Lord Mansfield's approach was a narrow one: "There are some damages so large, that it is impossible but that every man must acknowledge that they are too large." *Id.*

[11] Among the resolutions adopted by the First Congress of the American Colonies (the Stamp Act Congress) on October 19, 1765 — resolutions deemed by their authors to state "the most essential rights and liberties of the colonists," R. PERRY, ED., SOURCES OF OUR LIBERTIES 270 (1959) — was the declaration "[t]hat trial by jury is the inherent and invaluable right of every British subject in these colonies." The First Continental Congress, in the resolve of October 14, 1774, announced "[t]hat the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." PERRY, *supra*, at 288. The Declaration of Independence stated solemn objections to the King's making "Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries" and to his "depriving us in many cases, of the benefits of Trial by Jury."

Convention by an objection that the document under consideration lacked a specific guarantee of jury trial in civil cases."[12]

Indeed, so strong was respect for the jury that it was usually afforded the power at trial to decide questions of both law and fact.[13] For example, William Wyche wrote in his 1794 treatise

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[12] Wolfram, *The Constitutional Seventh Amendment*, 57 MINN. L. REV. 639, 657 (1973). "The institution of jury trial in civil cases was a familiar and well-ensconced feature of pre-1787 political life. . . . In fact, '[t]he right of trial by jury was probably the only one universally secured by the first American state constitutions.'" *Id.* at 653; *see also* Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 295 (1966) ("The almost complete lack of any Bill of Rights was a principal part of the Anti-Federalist attacks on the Constitution and the lack of provision for civil juries was a prominent part of this argument").

[13] "The view that even in civil cases 'the jury [are] the proper judges not only of the fact but the law that [is] necessarily involved' was widely held even by conservative jurists at the end of the eighteenth century." HORWITZ, *supra*, at 142 (quoting 1 Z. SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 410 (1795)); *see also* L. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 150-53 (1973); Nelson, *The Eighteenth Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 904 (1978); Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 OHIO ST. L. REV. 859, 899-900 (1991); John Adams, who was Chief Justice of the Massachusetts Supreme Judicial Court as well as patriot and President, wrote that:

> The general Rules of Law and common Regulations of Society, under which ordinary Transactions arrange themselves, are well enough known to ordinary Jurors.
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> * * *
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> Now should the Melancholly Case arise, that the Judges should give their Opinions to the Jury, against one of these fundamental Principles, is a Juror obliged to give his Verdict generally according to this Direction, or even to find the fact specially and submit the Law to the Court. Every Man of any feeling or Conscience will answer, no. It is not only his right but his Duty in that Case to find the Verdict according to his own best Understanding, Judgment and Conscience, tho in Direct opposition to the Direction of the Court.

Adams' Diary Notes on the Right of Juries, February 12, 1771, in 1 LEGAL

on New York practice that "[t]he jury may in all cases, where law and fact are blended together, take upon themselves the knowledge of the law." W. WYCHE, TREATISE ON THE PRACTICE OF THE SUPREME COURT OF JUDICATURE OF THE STATE OF NEW YORK IN CIVIL ACTIONS 168 (1794). Chief Justice John Jay, in trying a case under the Court's original jurisdiction, instructed the jury that it had the power "to determine the law as well as the fact in controversy." *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794). In *People v. Croswell*, 3 Johns. Cas. 337, 368 (N.Y. 1804), Judge (later Chief Justice and Chancellor) Kent wrote that "[t]he law and fact are so involved, that the jury are under an indispensable necessity to decide both, unless they separate them by a special verdict. This right in the jury to determine the law as well as the fact has received the sanction of some of the highest authorities in the law." The infamous Sedition Act of 1798 stated that "the jury who shall try the cause shall have a right to determine the law and the fact, under the direction of the court, as in other cases." 1 Stat. 597. *See also Bingham v. Cabot*, 3 Dall. 19, 33 (1795) (Iredell, Circuit Justice); *Coffin v. Coffin*, 4 Mass. 1, 25 (1808); *Sparf v. United States*, 156 U.S. 51, 142-68 (1895) (Gray, J., dissenting); *Galloway v. United States*, 319 U.S. 372, 399-400 (1943) (Black, J., dissenting); *Johnson v. Lousiana*, 406 U.S. 356, 374 n.11 (1972) (Powell, J., concurring).

There is no evidence that any of the framers believed that giving such power to the jury produced trials that were fundamentally unfair, or that such proceedings would have

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PAPERS OF JOHN ADAMS 230 (WROTH & ZOBEL ed. 1965).

For example, in New Jersey, by Provincial laws of 1676 and 1681, it was not only enacted "that the trial of all causes, civil and criminal, shall be heard and decided by the verdict of twelve honest men of the neighborhood," but also "that there shall be, in every court, three justices or commissioners, who shall sit with the twelve men of the neighborhood, with them to hear all causes, and to assist the said twelve men of the neighborhood in case of law; and that they the said justices shall pronounce such judgment as they shall receive from, and be directed by the said twelve men, in whom only the judgment resides, and not otherwise." LEAMING & SPICER'S LAWS, pp. 396-398, 428, 429.

violated the Fifth Amendment in the absence of appellate review. Indeed, appellate review could hardly have been used to check jury power in federal criminal cases, because there was no right of appeal from federal convictions until 1889, when Congress granted a writ of error in capital cases,[14] which was extended in 1891 by the Evarts Act to "otherwise infamous crimes." It would be odd if the practice of near-total deference to the jury, which existed at the time of the framing of the Fifth Amendment's Due Process Clause, were held to violate that Clause's counterpart in the Fourteenth Amendment.

III. AMERICAN PRACTICE IN THE NINETEENTH CENTURY

Even in the nineteenth century, personal injury tort awards and punitive damage verdicts were reviewed extremely deferentially, if at all. American courts observed the rule that such damages were the jury's domain. *See, e.g., Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852) (assessment of punitive damages "has always been left to the discretion of the jury"); *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 521 (1885) ("The discretion of the jury in such cases is not controlled by any very definite rules; yet the wisdom of allowing such additional damages is attested by the long continuance of the practice"); *Barry v. Edmunds*, 116 U.S. 550, 565 (1886) ("For nothing is better settled than that, in such cases as the present, and other actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict").

Thus, in *New Orleans, J., & Great N.R. Co. v. Hurst*, 36 Miss. 660 (1859), the court refused to grant a new trial for excessiveness where the jury awarded $4,500 against a railroad company when a conductor carried a passenger 400 yards beyond the railway station and forced him to walk back. The court expressed grave "regret" as to the size of the verdict, but explained that "the law furnishes no legal rule of measurement

[14] *See* Act of Feb. 6, 1889, § 6, 25 Stat. 655, 656.

[for exemplary damages], save [the jury's] discretion" and that "[i]t is not enough that, in the opinion of the court, the damages are too high. It may not rightfully substitute its own sense of what would be a reasonable compensation for the injury, for that of the jury." *Id.* at 666.[15]

[15] In *McWilliams v. Bragg*, 3 Wis. 424 (1854), the Wisconsin Supreme Court traced the judicial deference owed to damage assessments by juries in cases of personal injury and punitive damages, to early English precedent. The court summarized a number of leading English decisions, beginning with *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763):

> In an action for assault and imprisonment where the jury gave a verdict for £300, a motion for a new trial was denied, although it was supposed [that] £20 would have been sufficient damages for the mere injury. The court in that case declared, that the law had not laid down what should be the measure of damages in such actions — that it was vague and uncertain, depending upon a variety of causes, facts and circumstances.

3 Wis. at 427. The Wisconsin court then noted *Grey v. Grant*, 95 Eng. Rep. 794 (C.P. 1764), where, "in a case of assault and battery, [the English court] said, the jury were the proper judges of the damages." 3 Wis. at 427. Summarizing the decision in *Fabrigas v. Mostyn*, 96 Eng. Rep. 549 (C.P. 1774), the Wisconsin Court explained:

> Upon a motion for a new trial, ... the court of common pleas said it was very difficult to interpose with respect to the *quantum* of damages in actions for any personal wrong. "In the present case, (says Chief Justice De Grey), the injury was great, and the jury (not the court) are to estimate the adequate satisfaction." This was also an action for trespass and false imprisonment and a verdict for £3,000 damages was not disturbed.

3 Wis. at 427-28; *see also* T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 535 (1868) (referring to "the wide range always given the jury in actions of tort"); *id.* at 545 ("where circumstances of aggavation are proved the jury are the necessary as well as rightful judges of the amount of relief" in the form of punitive damages); *Respass v. Parmer*, 2 A.K. Marsh. 365, 365 (Ky. 1820) (denying new trial motion on the ground that "[i]n torts the jury are the exclusive judges of the damages"); *Tillotson v. Cheetham*, 2 Johns. 62, 74 (N.Y. Sup. Ct. 1806) (denying new trial motion on excessiveness grounds in slander case with the comment, "[w]e have no standard by which we can measure the just amount, and ascertain the excess. It is a matter residing in

A. The Difference Between Punitive Damages in Tort Cases and Easily Measured Damages in Other Kinds of Cases

American courts observed the important difference between (a) punitive damages and (b) damages susceptible to easy measurement, as in breach of contract cases concerning goods of readily defined market values. As Sutherland explained:

> In many cases of tort, . . . the injury complained of is of such a nature that compensation cannot be awarded by any precise pecuniary standard, and there is no legal measure of damages; because the injury does not consist of any pecuniary elements, or elements of which the value can be measured or expressed in money. . . . Where there is a legal measure of damages, the jury must determine the amount as a fact, according to that measure. . . . [I]f the injury was done with malice, by positive fraud, oppression or wanton violence, such measure, if any, while not entirely ignored, ceases to be a limit on recovery. The jury are at liberty, in the exercise of their judgment, on finding such malice or other aggravation, to give additional damages . . . .

1 J.G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES 2-3 (1883). The measure of damages was a question of law, and therefore within the court's dominion, only "[w]here the plaintiff complains of no injury to his person or his feelings; where no malice is shown; where no right is involved beyond a mere question of property; [and] where there is a clear standard for the measure of damages, and no difficulty in applying it." 3 J.G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES 470

the sound discretion of the jury"); *Southwick v. Stevens*, 10 Johns. 442, 446 (N.Y. Sup. Ct. 1813) (denying motion for new trial in libel case, noting that amount of damage "was for the jury to determine"); *Sheik v. Hobson*, 64 Iowa 146, 148 (1884) ("the question whether punitory damages shall be assessed, and the amount of the assessment, is left to the discretion of the jury").

(1883).[16]

B. Passion and Prejudice Review

To be sure, damage awards in personal injury and punitive damages cases were not entirely beyond judicial control. But courts did not review such awards according to whether they were against "the weight of the evidence." Courts typically inquired only as to whether the amount of the award was so unreasonable that it could be said to be the product of "passion and prejudice" on the jury's part.

Theodore Sedgwick explained the distinction between such "passion and prejudice" review and the weight-of-the-evidence standard: "[t]here is a cloud of cases going to show conclusively, that although the courts are entirely satisfied that the damages are excessive, and altogether beyond a compensation for the actual loss sustained, they will not, on a motion for a new trial, interfere with the finding, unless the verdict is so extravagant as to bear evident marks of prejudice, passion, or corruption." T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 533 (1868). As a Kentucky court explained in a battery case, "mere

[16] *See also Coleman v. Southwick*, 9 John. 45, 52 (N.Y. 1812) ("The courts say there is a great difference between cases of damage which can certainly be seen, and such as are ideal, as between assumpsit, trespass for goods, etc., where the sum and value may be measured, and actions of false imprisonment, malicious prosecution, slander, and other personal torts, where the damages are matter of opinion. The law has not laid down what shall be the measure of damages in actions of tort. The measure is vague and uncertain, depending on a vast variety of causes, facts and circumstances . . . Generally, in such cases, [the courts] cannot say whether five hundred pounds was too much, or fifty pounds would have been too little"); *Dorsey v. Manlove*, 14 Cal. 553, 556, 558 (1860) ("in an ordinary case of trespass, unaccompanied by any evil intent or improper motive, . . . [the law] limits the recovery to the value of the property with interest. . . . But where the trespass is committed from wanton or malicious motives, . . . the rule of compensation is not adhered to, and the measure and amount of damages are matters for the jury alone"); *Gilreath v. Allen*, 32 N.C. (10 Ired.) 67, 69 (1849) ("[i]njuries, sustained by a personal insult, or an attempt to destroy character, are matters, which cannot be regulated by dollars and cents," and juries "are allowed such full discretion as to make verdicts to deter others from flagrant violations of social duty"); *Linsley v. Bushnell*, 15 Conn. 225, 235-36 (1842).

excessiveness of damages will not entitle a party to a new trial, unless it be so enormous as, *per se*, to indicate passion or prejudice in the assessment." *Vanzant v. Jones*, 3 Dana. 464, 465 (Ky. 1835).[17]

[17] *See also* 3 J.G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES 469 (1883) ("When the allowance of [punitive] damages has been submitted to the jury, the amount which they think proper to allow will be accepted by the court, unless so exhorbitant as to indicate that they have been influenced by passion, prejudice or a perverted judgment"); D. GRAHAM, A TREATISE ON THE LAW OF NEW TRIALS IN CASES CIVIL AND CRIMINAL 452 (1st ed. 1834) ("The law favors the presumption that the jury are actuated by pure motives. It therefore makes every allowance for different dispositions, capacities, views, and even frailties, in the examination of heterogeneous matters of fact, where no criterion can be supplied; and it is not until the result of the deliberations of the jury appears in a form calculated to shock the understanding, and impress no dubious conviction of their prejudice and passion, that courts have felt themselves compelled to interfere"); *Coffin v. Coffin*, 4 Mass. 1, 41 (1808) ("one case is where the law recognizes some fixed rules and principles in measuring the damages, whence it may be known that there is an error in the verdict. In this case are included actions on contracts, or for torts done to property, the value of which may be ascertained by evidence. The other case includes actions for personal injuries, where no rules are prescribed by law for ascertaining the damages, but from the exorbitancy of them the Court must conclude that the jury acted from passion, partiality, or corruption — causes which naturally produce error or injustice. But to enable the Court to draw this conclusion, it is not enough, that in their opinion the damages are too high, or that much less damages would have been a sufficient satisfaction to the plaintiff; for the law has not intrusted the Court with a discretion to estimate the damages, but has devolved the power on a jury, as a matter of sentiment and feeling, to be exercised by them according to their sound discretion, duly weighing all the circumstances of the case"); *Taylor v. Giger*, 3 Ky. 586, 587 (1808) (denying new trial and commenting that, "[i]n actions for tort, sounding purely in damages, where there is no certain criterion to go by, a new trial ought not to be granted for excessiveness of damages, unless the damages found are so enormous as to shew that the jury were under some improper influence, or were led astray by the violence of prejudice or passion. ... [O]therwise, the verdict of the jury, must, in all cases, depend on the opinion of the judge, and the constitutional trial by jury, will be prostrated"); *Coleman v. Southwick*, 9 John. 45, 52 (N.Y. 1812) ("The damages. .. must be so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable, and outrageous"); *North v. Cates*, 5 Ky. 591, 593 (1812) (explaining that "the damages ought not to be weighed in a nice balance, but must be such as appear at first blush to be outrageous, and indicate passion or partiality in the jury, to authorise the granting of a new trial"); *Schlencker v. Risley*, 4 Ill. 483, 487 (1842) (affirming denial of new trial motion and explaining that "[c]ourts have always manifested a reluctance to disturb verdicts on account of excessive damages in [tort cases], and never disturb them unless it is probable, from the amount of the damages assessed, that the jury have acted under the influence of passion and prejudice"); *Clark v. Bales*, 15 Ark. 452, 459 (1855) (denying motion for new trial because award was not "so exorbitant as to indicate corruption, or bad faith on the part of the jury"); *Southern Kansas Ry. Co. v. Rice*, 38 Kan. 398, 404 (1888) (affirming jury award with the comment that "the damages are not so excessive as to indicate passion and prejudice on the part of the jury").

Early decisions by Justices of this Court also illustrate the principle. In *Walker v. Smith*, 4 U.S. (4 Dall.) 389 (1804), for example, Justice Washington, as Circuit Justice, denied a new trial motion on the ground that, "although he was not satisfied with the verdict, nor should he have assented to it as a juror; yet, the question of damages, or of interest in the nature of damages, belonged so peculiarly to the jury, that he could not allow himself to invade their province." *Id.* at 391.[18] In *Thurston v. Martin*, 23 F. Cas. 1189, 1190 (1830), Justice Story explained that "[t]he damages are certainly higher than what, had I sitten on the jury, I should have been disposed to give; and I should now be better satisfied, if the amount had been less. . . . The jury were, however, left at liberty to consider all the circumstances of the case, which might, in their opinion, enhance the right to damages . . . . It is one thing for a court to administer its own measure of damages in a case properly before it, and quite another thing to set aside the verdict of a jury, merely because it exceeds that measure. . . . Upon a mere matter of damages, where different minds might, and probably would, arrive at different results, and nothing, inconsistent with an honest exercise of judgment, appears, I, for one, should be disposed to leave the verdict, as the jury found it."[19]

[18] Sedgwick quotes Justice Washington as declaring in this case that "I admit that in cases where merely vindictive damages are sued for, the jury act without control on the subject of damages; because there is no legal rule by which they can be measured; and unless they are so extravagant as to induce a suspicion of improper conduct, the court will not interfere." T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 525 (1868).

[19] *See also Whipple v. Cumberland Mfg Co.*, 29 F. Cas. 934, 937-38 (Story, Circuit Justice) ("the general rule, now established, [is] that a verdict will not be set aside in a case of tort for excessive damages, unless the court

C. Honda's Cases Are Not to the Contrary

None of Honda's cases is to the contrary. In fact, many of the cases Honda cites contradict its historical claims.

For example, Honda cites (Pet. Br. at 16 n.10) *Thompson v. Morris Canal & Banking Co.*, 2 Harr. 480 (N.J. Sup. Ct. 1840), which granted a new trial in a case involving trespass to land, on the ground that "trespass to land, not being of an ideal but of a visible tangible nature, admits of measurement and appraisal, so nearly certain, that honest minds seldom differ much about the amount." *Id.* at 483. But the court noted that the rule was very different in other cases: "equivalents being not clearly ascertainable in such personal torts as battery, slander, seduction, deceits, and frauds, for want of any certain measure to go by, damages must be adjusted in such actions according to the circumstances of the case, by the discretion of a jury; and though all verdicts are subject to legal control, *they are never disturbed by a court*, where the jury, as in those cases, have no rule to go by, 'unless the damages given are flagrantly and outrageously excessive, manifestly showing the jury to have been actuated by passion, partiality, corruption, or prejudice.'" *Id.* at 482 (citation omitted).

Honda also relies on (Pet. Br. at 15-16 n.10) *Collins v. Albany & Schenectady R.R.*, 12 Barb. 492, 495 (N.Y. Sup. Ct. 1852), which stressed that "[i]t is the peculiar province of a jury to assess damages, and where, as in actions sounding in damages merely, the law furnishes no legal rule of admeasurement, it is very rare indeed, that a court will feel itself justified in setting aside a verdict, merely for excess. It is not enough that, in the opinion of the court, the damages are too high. It may not, rightfully, substitute its own sense of what would be a reasonable compensation for the injury, for that of the jury . . . . In

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can clearly see that the jury have committed some very gross and palpable error, or have acted under some improper bias, influence, or prejudice, or have totally mistaken the rules of law, by which the damages are to be regulated. . . . [I]n no case will the court ask itself, whether, if it had been substituted in the stead of the jury, it would have given precisely the same damages").

actions, involving moral delinquency on the part of the defendant, examples are very rare, in which the damages have been found to be so excessive as to induce the court to order a second trial."[20]

CONCLUSION

History does not support Honda's argument. "Excessiveness" review of punitive damages according to a weight-of-the-evidence standard is not part of the Anglo-American legal tradition.

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[20] The other cases cited by Honda in Pet. Br. at 15-16 n.10, do not support its argument:

- *Sampson v. Smith*, 15 Mass. 365 (1819), referred to the need for new trials when "jurors are liable to have their passions excited" and nonetheless cautioned that the authority to grant new trials "ought to be exercised with great caution and discretion." *Id.* at 367.
- *Travis v. Barger*, 24 Barb. 614 (N.Y. App. Div. 1857), *denied* a motion for new trial, explaining that "the damages were not so flagrantly outrageous and extravagant, as necessarily to evince intemperance, passion, partiality or corruption on the part of the jury; and that, where that is not the case, the court will not undertake to set their judgment on a question of damages, in an action of this nature, in opposition to the judgment of the jury." *Id.* at 629.
- *Worster v. Proprietors of Canal Bridge*, 33 Mass. 541 (1835), *denied* a motion for new trial on excessiveness grounds, observing that damages in personal injury cases are "peculiarly within the province of the jury to determine," noting that "the judgment of the jury and not the opinion of the Court is to govern," and referring to jury "partiality or prejudice" as a basis for granting a new trial. *Id.* at 547.
- *Belknap v. Boston & Maine R.R.*, 49 N.H. 358 (1870), granted a new trial trial because "[w]e think it evident that the jury were affected by partiality or prejudice from some cause." *Id.* at 374.
- *Guerry v. Kerton*, 18 S.C.L. (2 Rich.) 507 (Ct. App. 1846), was a trover case — i.e., the wrongful conversion of property belonging to another — where the measure of damages was always a matter of law.
- In *McCarthy v. Miskern*, 22 Minn. 90 (1875), the court was convinced that "the verdict was not assessed with a view to [the evidence] alone," *id.* at 92 — *i.e.*, that the jury was prejudiced by extrinsic factors.

Respectfully submitted

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INTEREST OF *AMICUS CURIAE*

The Oregon Trial Lawyers Association is an organization of 800 attorneys in Oregon who represent claimants in products liability cases and other civil actions. OTLA has a strong interest in preserving the finality of jury verdicts on issues of fact and Oregon's system of allocating roles between judge and jury in civil litigation. OTLA therefore submits this brief in support of respondent's position.[1]

INTRODUCTION

Honda casts this case as a procedural challenge. Honda does not attack Oregon's substantive law. It levels its attack on Oregon's system of adjudication as a denial of procedural due process.

This brief defends Oregon's courts against that attack. It shows that Oregon provides the full panoply of procedural guarantees, including judicial review of the evidentiary basis of the factual predicates of punitive damages or other facts found by juries. Oregon courts follow the familiar division of review of issues of law (such as the standards for punitive damages) and issues of fact (for evidence), if only a litigant takes advantage of the opportunity offered by the procedural system. Honda failed to do that in this case.

Unsatisfied or unsuccessful with a full range of civil jury trial and judicial review procedures — a properly instructed jury fully informed of the legal standards which control a punitive damages award as approved by this court,[2] with three levels of state court review of the sufficiency of the evidence to support the verdict and review of all legal issues Honda chose to raise — Honda now claims a constitutional entitlement to "judicial excessiveness review." According to Honda, this is a Fourteenth Amendment mandate that state judges must reweigh the evidence considered by the jury because only this can ensure a damage award that is not "excessive." But this claim goes well beyond procedure.

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[1] Counsel for both the petitioners and the respondent have consented to the filing of this brief. Their consents are on file with the Clerk.

[2] *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 21-2 (1991).

Honda's argument is founded on two premises: One, that a properly instructed jury, deciding the case on the correct substantive standards controlling a damages award and basing those standards on adequate evidence, may render a constitutionally "excessive" verdict. Two, that only post-verdict judicial reevaluation of the evidence can fix it.

The first may be a problem but not in this case. It can be remedied by judicial review, as a question of law, of whether the award breaches the Fourteenth Amendment's substantive limit which this Court recognized in *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993).[3]

The second is the heart of the matter. If Honda merely seeks to displace one factfinder (the constitutionally designated one) with another (the judge), the Fourteenth Amendment, which does not specify any tribunal or official for factfinding, does not compel such review. On the other hand, if Honda expects a judicial officer to bring something more to the equation, that something can only be different legal standards about what is "excessive." If a judge knows what the standards are, a judge can articulate them. If a judge can instruct the jury, the jury can and should apply them to the evidence.

Whatever the legal standards are for awarding punitive damages, they cannot be different for a judge than a jury. They need not be mathematically precise. They may describe a range of permissible outcomes rather than a single result. They may make it possible that different judges and different juries could reach different outcomes on the same evidence.

Substantive due process confines the standards a state may use in directing the jury's damage award. This Court has addressed the standards relevant to a punitive damage award in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), and the jury below was instructed under a statute that met these standards.

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[3] Five members of this Court agreed that the Due Process Clause imposes substantive limits "beyond which penalties may not go." *TXO*, 113 S. Ct. at 2718. The Oregon Supreme Court reviewed this award for compliance with substantive due process limits and upheld it. Pet. App. 29a. Honda disavows that it raises a substantive due process claim in this case. Reply Brief for the Petitioners at 2, 7.

Honda did not at trial and cannot here dispute the legitimacy or completeness of the legal standards upon which the jury was instructed for this damage award. If some other legal standards would further protect Honda from an excessive verdict, it was free, under Oregon procedures, to state them, to urge the trial judge to instruct accordingly, and to challenge any refusal to do so as legal error in post-judgment motions and on appeal.

Honda urges, sporadically, before this Court that the jury instructions on punitive damages were inadequate.[4] These complaints wobble between attacks on the instructions as given (for failing to tell the jury the weight or exclusivity of the standards), and complaints about standards not given (for failing to include the range of punishments imposed on comparable wrongdoers). Honda did not present these claims to the Oregon courts, which would have given them full review as issues of law.[5] Honda's opportunity to assert any of these claims has come and gone. And because, as Honda so assiduously argues, this is not a substantive due process case, the legal standards that control the factfinders' discretion are not at issue here.

Nor does Honda dispute in this Court the sufficiency of the evidence to support this damage award.[6] Honda could have requested a special verdict form specifying the jury's answer to the statutory criteria for its award, ORCP 61, and in this way test with great precision the sufficiency of the evidence on each element. But it did not do so.

Having been afforded a full spectrum of procedural protections, Honda urges nothing less than a federal

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[4] *See, e.g.*, Petition for a Writ of Certiorari at 10, 24, 32; Reply Brief for the Petitioners at 3, n.3, urging this Court to urge the Oregon Courts to develop unspecified "common law excessiveness standards."

[5] *See* Pet. App. 22a n.11; pp. 13-14 & n.17, *infra*.

[6] The Oregon courts found sufficient evidence to support the verdict. *See* Pet. App. 26a-29a, 82a-87a. Honda raises an attack in this Court on the sufficiency of the evidence to support the jury's decision that it acted "wantonly," an attack that it claims "raises serious substantive due process questions," Reply Brief for the Petitioners at 3-4 n. 4, yet in virtually the same breath Honda disclaims any reliance on substantive due process. See note 3, *supra*.

constitutional principle that a state must set aside a verdict as "excessive" whenever a reviewing court thinks it is. This is a freewheeling and insupportable view of due process, and hardly a principle upon which to dismantle eighty years of Oregon trial and appellate procedure. Oregonians' decision to disallow their judges to reweigh facts found by a jury and supported by the evidence does not violate the Fourteenth Amendment.

SUMMARY OF THE ARGUMENT

1. This case is not about one state's "aberrant" procedures. It concerns the distribution of factfinding responsibilities between judge and jury. By constitutional amendment, facts found by Oregon juries may not be "re-examined" by state judges so long as evidence supports them. Art. VII, § 3, Or. Const.[7] The Oregon Constitution captures a balance of authority between judge and jury rooted in history and constitutional first principles. Defendant's argument that due process *requires* a judge to displace the jury's finding of fact completely ignores this balance.

2. There is no support for Honda's position that due process requires a state court judge to make an independent evaluation of any factual issue, including the amount of damages, after a properly instructed jury has reached a verdict based on the evidence.[8] Well-established law is to the contrary. Indeed, Honda's challenge to the legitimacy of factfinding by other than a judge calls into question settled law for administrative and criminal as well as civil procedures. At bottom, due process requires fair procedures ensuring a fair outcome. Whatever

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[7] Article VII, § 3 of the Oregon Constitution provides in relevant part:

> In actions at law, where the value in controversy shall exceed $200, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.

[8] Even critics of the jury system of assessing punitive damage awards do not suggest that due process requires judges to assess damages. *See, e.g.*, Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va L Rev 269, 302-3 (1983), quoted *infra* note 13.

procedural guarantees it offers must be available to plaintiffs as well as defendants.

3. This court's concerns about punitive damage awards are best addressed by legislative and not judicial solutions, and Oregon's legislature has acted. Beginning in 1977 the Oregon legislature has been codifying and modifying the common law of products liability. In 1979 the legislature prescribed the comprehensive controls on punitive damages which were applied in this case — an enhanced standard of proof, evidentiary restrictions to protect wealthy defendants, and the detailed criteria which a jury must be told to apply.

ARGUMENT

1. The Oregon Constitution preserves the accepted role of the jury as factfinder.

The jury has long been responsible to set damage awards in civil cases. *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763). The federal courts, reflecting this unchallenged state of affairs, have treated damage awards as an integral part of jury factfinding. *See, e.g., Kennon v. Gilmer*, 131 U.S. 22, 29 (1889) (holding that, with regard to damages for pain and suffering, "in a case in which damages for a tort have been assessed by a jury at an entire sum, no court of law, upon a motion for a new trial for excessive damages and for insufficiency of the evidence to support the verdict, is authorized, according to its own estimate of the amount of damages which the plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by the jury."); *Day v. Woodworth*, 54 U.S. (13 How.) 362, 371 (1851) (noting that the assessment of punitive damages "has always been left to the discretion of the jury, as the degree of the punishment to be thus inflicted must depend on the peculiar circumstances of each case.").

The drafters of Article VII, § 3 saw this constitutional amendment as a guarantee that the jury's verdict would remain effective. It would keep the law consistent with what they perceived to be the common law rule, rather than permitting the

gradual expansion of judicial power to set aside or modify a jury's factual conclusions. As Judge O'Day, one of the authors, stated:

> For 75 years after the Constitution of the United States was adopted the courts generally held that a verdict of the jury should not be disturbed provided there was any competent evidence to support the verdict.

The Oregonian, December 2, 1910, at 9.

The premise, the judge said, was that twelve jurors "selected from the body of the community are more competent to pass upon and determine rightly a question of fact than any one member of the community, even though that person be a judge," and the result of their verdict reflects "the general sentiment of the community as to what the facts are." *Id.* Therefore the judge has the duty

> to see that proper evidence is admitted and improper evidence is excluded and that the jury is properly directed as to the issue of law and when that is done he has done all that the law requires him to do and the responsibility for a result as to the facts is to be left entirely to the jury.

Id.

In addition, the proponents felt that "controversies ought to end some time and the public ought to know by what tribunal these controversies are to be determined." *Id.*

> This idea that there are two or three tribunals to try questions of fact and one can reverse the other and vice versa makes litigation everlasting. It is a process by which the expenses eat up both the lawyers and the clients.

Id.

On this ground, the measure's advocates found support from then President (later Chief Justice) William Howard Taft, who had urged reform of a system where "the man with the longest purse has the advantage, because the litigation is drawn out." One purpose of the amendment was "to make that kind of injustice impossible in which the corporation or the rich man

wins because of the longest purse."[9]

Thus Article VII, § 3 of the Oregon Constitution was enacted to preserve the constitutional and common law expectation that juries should decide the facts and their decision should be final absent a showing of legal error. This move to protect the jury's decision from encroachment and revision by the judiciary was not an uncommon sentiment for the time.[10] To continue to abide by these origins should not be a constitutional deficit today.

We need not guess at the legitimacy of juries as competent factfinders. The constitutions make them so. Article I, § 17, Oregon Constitution; Seventh Amendment, U.S. Constitution. The jury's factfinding responsibility has always encompassed the assessment of damages. As the Oregon Supreme Court observed in *Van Lom v. Schneiderman,* 187 Or. 89, 95, 210 P.2d 461 (1949), this point "has not been disputed, and cannot be." From this the court reasoned that a judge's determination of the "excessiveness" of a verdict is a reevaluation of fact. Because Article VII, § 3 of the Oregon Constitution says "no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict," *Van Lom* prohibits a trial judge from substituting the judge's opinion of the evidence so long as the facts found by a jury are supported by evidence. The Due Process Clause requires no more.

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[9] Pamphlet Containing a Copy of All Measures . . . Submitted . . . at the Regular General Election . . . on the Eighth Day of November, 1910, at 176-77.

[10] In addition to the Tennessee prohibition on more than two retrials, upheld in *Louisville Railroad Co. v. Woodson*, 134 U.S. 614 (1889), an 1898 Ohio statute disallowed trial courts from granting more than one new trial in the same case "on the weight of the evidence." Its 1908 amendment, preventing appellate courts from doing the same thing, was motivated by the sentiment "one trial and one review" and was upheld in *Isaac v. Intercoast Sales Corporation,* 7 N.E.2d 216, 219 (Ohio 1937). Indeed, similar sentiments inform the Seventh Amendment as well: "Antifederalists expressed a specific desire for juries to be able to control damage awards, including punitive damages, in order to defend the people against deliberate invasions of their legal rights by government officials or economically superior citizens." Note, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power,* 91 Colum. L. Rev. 142, 144 (1991).

2. The Due Process Clause of the Fourteenth Amendment does not displace a state jury from its traditional and well-established role.

Due process does not constrain the States to any particular balance of functions between judge and jury. *Chicago, R.I. & Pac. Ry. Co. v. Cole*, 251 U.S. 54 (1919), upheld the Oklahoma Constitution against a due process challenge. The state constitution declared that issues of contributory negligence and assumption of risk shall "at all times, be left to the jury." 251 U.S. at 55. The court was not distracted by the defendant's argument about issues of law and issues of fact, focusing instead on the crux of the matter: that the state constitution left the question entirely to the jury. This, according to the court, was fine:

> There is nothing . . . in the Constitution of the United States or its Amendments that requires a State to maintain the line with which we are familiar between the functions of the jury and those of the Court.

Id. at 56.

When asked explicitly whether due process required state judges to reweigh the facts and to impose their own opinion on the propriety of a damage award supported by the evidence, this Court said no. *Louisville Railroad Co. v. Woodson*, 134 U.S. 614 (1889), upheld a Tennessee statute against a Fourteenth Amendment challenge that claimed, as a part of due process, entitlement to a trial judge's review of the weight of the evidence and a new trial if, in the judge's opinion, the evidence did not justify the verdict. At issue was a statute which prevented "[n]ot more than two new trials . . . in any action at law." 134 U.S. at 619. This Court held that the statute could be interpreted to comport with the Due Process Clause if it was understood to mean that

> whenever the statute is applied, it must be upon the assumption that although the court would have found a different verdict, because of the weakness of the evidence, yet *there was some evidence* tending to establish the cause of action.

Id. at 623 (emphasis added).

This Court carried the same idea into the administrative law context in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1935). The case was framed by caselaw, most notably *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1919), establishing that due process required a state to submit an administrative agency's ratemaking decision to judicial review, as to both the law and the facts, so that a judge may exercise independent judgment. The premise was that whenever constitutional rights were at stake (in ratemaking cases, takings claims were common) due process required a judicial tribunal to decide the case "upon its own independent judgment as to both law and fact." 253 U.S. at 289.

St. Joseph Stock Yards dispensed with this requirement, recognizing in a later era the legitimacy of agencies duly empowered and directed by legislatures. The Court held that so long as agencies met the procedural requirements of due process, their findings of fact may be considered conclusive, due process is met by "according a fair hearing and acting upon evidence and not arbitrarily." *Id.* at 51. These requirements having been met,

> the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its statutory authority.

Id. Justice Brandeis, concurring, elaborated on the due process requirement, with express application both to jury and to agency factfinders:[11]

> The inexorable safeguard which the due process clause assures is not that a court may examine whether the findings as to value or income are correct, but that the trier of the facts shall be an impartial tribunal; that no

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[11] Justice Brandeis assumed that the Seventh Amendment prohibits a judge from overturning a jury's finding of fact if it is supported by substantial evidence. He asked rhetorically why the factfinding of qualified agency administers should not likewise be conclusive, so long as supported by the evidence. 298 U. at 73.

> finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed.

Id. at 73. Justice Brandeis further stated:

> The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. . . . But supremacy of law does not demand that the correctness of every finding of fact to which the rule of law is to be applied shall be subject to review by a court.

Id. at 84.

Nor has due process yet been held to require the States to provide an appeal of any kind. *McKane v. Durston,* 153 U.S. 684, 687-88 (1894) (criminal proceeding); *Standard Oil Co. v. Missouri*, 224 U.S. 270, 286-87 (1912) (original proceeding adjudicated by state supreme court); *Ortwein v. Schwab,* 410 U.S. 656, 660 (1972) (administrative proceeding).[12]

Thus, Article VII, § 3, which requires state judges to uphold facts supported by evidence, fully comports with due process.

But recent opinions of this Court cast doubt on the traditional practice of allowing a jury to award punitive damages without standards to guide discretion. When factfinding requires the exercise of discretion, as unliquidated and punitive damage

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[12] For at least two reasons, comparison of jury trial rights with the due process considerations of *Mathews v. Eldridge,* 424 U. 319 (1976), is completely misplaced. First, that case involved the complete absence of any process: the deprivation of disability benefits without prior notice or hearing. A full-blown civil jury trial presumes procedures far in excess of anything *Mathews* required. Second, a civil tort action is not a confrontation between the government and a citizen. It concerns private litigants, none of whom needs extra protection from accepted procedures and each of whom has an equal interest in a fair process that ensures a fair outcome. *See also* Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process,* 52 Ohio St. L. J. 859, 884-93 (1991), offering additional reasons.

awards do, this Court requires that the jury's discretion must be guided by appropriate legal standards. In *Haslip* and *TXO*, this Court upheld punitive damage verdicts in part because judicial review ultimately supplied the legal standards which the jury lacked, and a judge reviewed the evidence for compliance with those standards.[13] If this is what due process requires, Oregon has already provided it, both in guiding the jury's discretion and on judicial review.

3. Oregon trial and appellate practices meet due process requirements while upholding juries as legitimate factfinders.

Unlike many state court jurisdictions and in contrast to the Federal Rules of Civil Procedure, Oregon is not a notice pleading jurisdiction. ORCP 18 requires "a plain and concise statement of the ultimate facts constituting a claim for relief"; the Council on Court Procedures decided "to retain a requirement of fairly specific description of facts." Council on Court Procedures, Staff Comment to ORCP 18. Motion practice is frequent and defendants can and do seek dismissal (or, alternatively, orders to make more definite and certain) for failure to state ultimate facts sufficient to constitute a claim. ORCP 21A(8), 21D. The result, therefore, is that plaintiffs seeking both compensatory and punitive damages must allege the

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[13] This Court has acknowledged that allowing judges to reweigh the evidence in the absence of precise standards does not solve the problem:

> One must concede that unlimited jury discretion -- or unlimited judicial discretion for that matter -- in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities.

Pacific Mutual Life Insurance Co. v. Haslip, supra, 499 U.S. at 18. *See also* Wheeler, *supra* note 8, at 302-03:

> Although judges may indeed be more dispassionate, due process probably does not mandate that judges decide the size of punitive damages awards. . . . [A] change to judge-determined awards is based on speculation that one group of citizens — judges — are less likely to produce arbitrary or erroneous results than are other groups. . . . The choice between these two decisionmakers, therefore, seems to be one of legislative policy, not one of constitutional dimensions.

facts supporting their claims with great specificity, and mere conclusory assertions will not suffice. As a corollary, defendants to such claims have the advantage of knowing with some precision what facts they must counter at trial.

With respect to punitive damages, it is not unusual for trial courts to hold that the allegations, even if proved to be true, are insufficient to sustain a conclusion that defendant acted in "wanton disregard for the health, safety and welfare of others." *See, e.g., Davis v. Tyee Industries*, 295 Or. 467, 479, 698 P.2d 1186 (1983) (holding that "[w]here punitive damages are sought, the complaint should set forth the ultimate facts which are claimed to support the recovery of punitive damages"); *Holden v. Pioneer Broadcasting Co.*, 228 Or. 405, 418, 365 P.2d 845 (1961) (upholding a trial court's order striking the punitive damages allegation from the complaint as insufficient).[14]

Furthermore, plaintiffs are required to plead the amount of damages sought.[15] A verdict cannot exceed the amount pleaded, and the jury is so informed.[16] A plaintiff must therefore be willing to stand before a panel of Oregon jurors, well known to be conservative, and justify the amount of damages requested. A plaintiff who pleads an inordinate amount of damages finds the case contaminated by the appearance of avarice and must fear that the natural reaction of the jury will impair the claim. The law therefore creates an effective practical check on the amount of recovery a plaintiff seeks, which becomes a legal limit on the amount a plaintiff can recover.

By use of the summary judgment procedure, defendants may, and frequently do, test the ability of the plaintiff to prove the specific facts which plaintiff has been required to plead. ORCP

[14] For example, in contrast to Alabama (*see Haslip*, 111 S. Ct. at 1037 n.1), under Oregon law a pleading and proof of fraud is not, without more, sufficient to sustain recovery of punitive damages. *Schmidt v. Pine Tree Land Dev.*, 291 Or. 462, 631 P.2d 1373 (1981).

[15] ORCP 18B provides that a pleading shall contain "a demand of the relief which the party claims; if recovery of money or damages is demanded, the amount thereof shall be stated."

[16] *Wiebe v. Seely*, 215 Or. 331, 337, 335 P.2d 379 (1959).

47A. A partial summary judgment may therefore eliminate all or part of a claim for punitive damages prior to trial. A defendant has ample opportunity to gain notice prior to trial of the specific facts upon which a plaintiff is basing a claim for punitive damages.

At trial, defendants have an opportunity for a detailed *voir dire* of the jury; potential jurors can be challenged for cause if there is evidence of bias or prejudice; and each party has three peremptory challenges. ORCP 57.

Defendants can challenge the sufficiency of plaintiff's proof, both at the end of the plaintiff's case and at the conclusion of all the evidence; if there is no evidence to support an element of a claim, including a claim for punitive damages, it will not be submitted to the jury. ORCP 60. Under ORS 30.925(2) and ORS 41.315(2), evidence of a defendant's financial condition is not admissible until a plaintiff presents evidence sufficient to establish a prima facie right to punitive damages.

Defendants are entitled to appropriate instructions. In a products liability case, jurors must be informed of the statutory criteria[17] for making an award of punitive damages, and that

[17] ORS 30.925 provides:

(1) In a product liability civil action, punitive damages shall not be recoverable unless it is proven by clear and convincing evidence that the party against whom punitive damages is sought has shown wanton disregard for the health, safety and welfare of others.

(2) During the course of trial evidence of the defendant's ability to pay shall not be admitted unless and until the party entitled to recover establishes a prima facie right to recover under subsection (1) of this section.

(3) Punitive damages, if any, shall be determined and awarded based on the following criteria:

- (a) The likelihood at the time that serious harm would arise from the defendant's misconduct;
- (b) The degree of the defendant's awareness of that likelihood;
- (c) the profitability of the defendant's misconduct;
- (d) The duration of the misconduct and any concealment of it;
- (e) The attitude and conduct of the defendant upon discovery of the misconduct;
- (f) The financial condition of the defendant; and
- (g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations

punitive damages are not recoverable unless a plaintiff has proven wanton disregard by clear and convincing evidence. ORS 30.925(b). The jury was so informed in this case, and Honda did not take issue with these instructions. Pet. App. 22a n.11. In addition, a defendant who believes that the common law or the state or federal constitution requires other and different standards to be applied has an opportunity to request appropriate instructions, and a failure to give requested instructions can then be reviewed as an issue of law after the verdict. No such request was made in this case.

A defendant may ask that special interrogatories be submitted to a jury. ORCP 61. In a products liability punitive damages case, a defendant concerned that there is a failure of proof on any of the statutory criteria could ask that the criteria be submitted in the form of interrogatories to the jury. Sufficiency of the evidence to sustain a jury's answer, or an inconsistency between the answers, can then be examined as an issue of law both by the trial court after verdict and by the appellate courts. No such special interrogatories were requested in this case.

As discussed above, due process requires a verdict based on the evidence rendered by an impartial tribunal and not arbitrarily. Thus, in Oregon a damage award that is not based on the evidence cannot stand. It may be excessive or it may be inadequate, but in Oregon if there is "[i]nsufficiency of the evidence to justify the verdict or other decision, or . . . it is against law,"[18] the trial judge directs a new trial. ORCP

similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.

[18] This is the same standard for a new trial, in almost identical words ("against all the evidence" or "against law"), as that used in English common law cases in the mid- to late-1700s. Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 311 (1966). As Henderson's research reveals, there was no generally recognized English common law practice that a trial judge could set aside a verdict because the judge found it against the weight of the evidence. *Id.* 311-12.

The diversity of practice in the American states was even more pronounced. The American states from the beginning balanced the powers of judge and jury in diverse ways. The broad diversity in civil jury practice at the time of the enactment of the federal constitution made it impossible to draft

64B(5). Similarly, a damage award imposed by a biased jury cannot stand. Jury bias, or the fear of it, may be a part of what Honda labels "excessiveness." In Oregon a verdict based on "[i]rregularity in the proceedings of the . . . jury" and "misconduct of the jury," will be sent back for new trial. ORCP 64 B(1) and (2). Post trial as well as before submission to the jury, a defendant may test the sufficiency of evidence to support each of the criteria if a special verdict form has been submitted requesting the jury's answer to the statutory questions. A failure of evidence on any of these points is subject to judicial review and reversal for new trial.

The role of Oregon judges in reviewing law and fact in punitive damage awards is shown by *Andor v. United Air Lines*, 303 Or. 510, 739 P.2d 18 (1987), a damage action by a passenger of a United flight that crashed before reaching the Portland, Oregon airport. A jury awarded both compensatory and punitive damages under instructions using standard formulations of "willfull or wanton disregard of risk . . . amounting to deliberate disregard of the rights and safety of others." The trial court set aside the jury verdict for punitive damages for lack of adequate evidence. 303 Or. at 505-07. The Oregon Supreme Court affirmed the trial court's action, holding that the several discrete instances of substandard, but not "wanton," actions by a number of United's personnel could not be cumulated into wilfully irresponsible performance by the defendant organization as a whole. *Id.* at 512-16.

Andor did not involve the amount of punitive damages, but the case shows how the Oregon Supreme Court would approach review of that issue if a party laid the proper foundation for review. Justice Linde's opinion for the unanimous court expressed criticism of the standard practice of litigants to blend facts and legal standards in blanket jury instructions without

a civil jury trial right in the original constitution. Two years later, language general enough to encompass all states' practices appeared as the Seventh Amendment in the Bill of Rights. *See* Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 Geo. Wash. L. Rev. 723, 742-45 (1993).

regard to the nature of the defendant or the defendant's conduct or the purposes that punitive damages were designed to serve in one type of case as compared with another type.[19] That discussion concluded:

> Perhaps more differentiated jury instructions should be developed to identify the factual elements on which punitive damages depend in essentially different types of cases, but the instructions here are not in issue. Rather the present formulas require attention to the judicial role in determining whether in the particular pattern before the court there is a factual basis for each necessary element on which a factfinder may award punitive damages.

Id. at 511-12 (footnote omitted). Footnote eight to this passage cited the criteria for punitive damages in the products liability statute, ORS 30.925 (*see* note 17, *supra*), as an example how the factual elements of punitive damages could be differentiated.

Similarly, Honda in the present case might have submitted to the trial court a proposed, more differentiated, interpretation of how the statutory criteria of ORS 30.295 should be applied and quantified. It might have asked for a special verdict form on which the jury would respond to whatever analysis the trial court submitted to it. See *Andor*, 303 Or. at 512-13. The trial court's ruling on such a request would have been an issue of law and would have been reviewed as an issue of law on an appeal by the

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[19] Justice Linde pointed out:

> United's petition for review is directed to the adequacy of the evidence rather than to the phrasing of the instructions. The parties' briefs, however, compare the facts in this case with the facts and the opinions in other cases in which this Court has allowed or disallowed awards of punitive damages. Doubtless there has been in review of punitive damages the blending of facts and legal standards, of the roles of courts and juries, to which the Court of Appeals referred. They are not easily disentangled.
>
> We do not here review in detail the many cases quoted by the parties. The problem of disentangling facts and legal standards arises because judicial statements of criteria for punitive damages have sought to encompass very different situations in one general formulation.

303 Or. at 510.

losing party. Assuming a proper trial court ruling on the request, the trial court then would have been called upon to scrutinize whether there was evidence to support each element of the claimed amount of punitive damages, in the same manner as the trial court did in *Andor*, and this ruling in turn would have been reviewed on appeal in the same manner as in *Andor*. In no way would such a trial or appellate procedure fall short of due process. But in this case, as in *Andor*, the defendant did not avail itself of these procedural opportunities to sharpen the statutory standards for appropriate punitive damages, and then to have the evidentiary support for each element of the standards judicially reviewed.

CONCLUSION

Dimick v. Schiedt, 293 U.S. 474, 482 (1934), summarized the common law procedures for awarding and reviewing a jury's damage verdict and concluded: "[A litigant] is entitled to an assessment by a jury which acts properly." Oregon assures that its juries act properly in the many ways enumerated above. Article VII, § 3 was not intended, and in this case clearly was not applied, to permit a jury to render any verdict it chose. The jury's discretion to award compensatory and punitive damages was guided by instruction. The instructions derive from standards developed by courts and, in the case of punitive damages in this product liability case, enacted by the legislature. The court's post-verdict review to ensure the adequacy of evidence to support these legal standards fully meets due process requirements.

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IN THE

Supreme Court of the United States

October Term, 1993

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD.; AND AMERICAN HONDA MOTOR CO., INC.,

Petitioners,

v.

KARL L. OBERG,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

MOTION FOR LEAVE TO FILE SUPPLEMENTAL POST-ARGUMENT BRIEF, AND SUPPLEMENTAL POST-ARGUMENT BRIEF OF RESPONDENT

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL POST-ARGUMENT BRIEF PURSUANT TO RULE 25.6 OF THE RULES OF THE SUPREME COURT

Pursuant to Rule 25.6, respondent hereby moves for leave to file this supplemental brief to call this Court's attention to a pertinent decision by the Oregon court of appeals announced yesterday, on April 20, 1994. A copy of the decision is attached as an Appendix hereto.

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SUPPLEMENTAL POST-ARGUMENT BRIEF OF RESPONDENT

Yesterday's decision of the Oregon court of appeals in *Tenold v. Weyerhaeuser Company*, No. A 72816 (Or. App. Apr. 20, 1994) (Supplemental Appendix ("SA") hereto), confirms that Article VII, § 3 permits Oregon courts to ensure, even on post-trial review, that the amount of damages awarded by the jury is supported by legally sufficient evidence.

In *Tenold*, the Oregon court of appeals affirmed the denial of a defendant's new trial motion. A jury had awarded the plaintiff a total of $900,000 in noneconomic damages on the basis of the plaintiff's three claims. The defendant contended that this award violated ORS 18.560, which sets a limit of $500,000 for noneconomic damages in any "civil action."[1] The court held that the plaintiff's three claims were comprehended in a single "action."

The court of appeals further explained that ORS 18.560 was invalid to the extent that it "requires the court to apply the monetary standard [of $500,000] in every case, whether or not the evidence supports the jury's higher damage award." SA 15. The court continued:

> We have examined the context of the adoption of Article VII (amended), section 3, and the problem that it sought to remedy. From our examination, we conclude that a jury's verdict on damages, *which is supported by the evidence*, is a "fact tried by a jury"

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[1] ORS 18.560 provides in relevant part:

> Except for claims [under certain statutory provisions] in any civil action seeking damages arising out of bodily injury, including emotional injury or distress, death or property damage of any one person ... the amount awarded for noneconomic damages shall not exceed $500,000.

> under that amendment, and that ORS 18.560 violates that amendment, because it compels the court to reexamine the verdict by requiring the court to nullify the jury's factual determination to the extent that it exceeds the legislature's damage cap.
>
> * * *
>
> ORS 18.560 directs the court to nullify the jury's verdict on damages to the extent that the verdict exceeds the amount that the legislature has determined is a fair award in all cases, *regardless of the jury's contrary determination from the evidence in a particular case*.

SA 15, SA 18 (emphasis added).

> The court concluded that:
>
> Weyerhaeuser's motion invited the trial court to set aside the jury's verdict, because it was too large when measured by the damage cap in ORS 18.560. Article VII (amended), section 3, forbids the court to reexamine the verdict *unless no evidence supports it. Because evidence in the record supported the verdict*, the court correctly refused to set it aside.

SA 18 (emphasis added).[2]

It is not material whether the court of appeals was correct that ORS 18.560 operates as an after-the-fact reassessment of the amount of damages determined by the jury, rather than simply as a change in Oregon substantive law placing a ceiling on a plaintiff's entitlement to damages. The nature of ORS 18.560 is a matter of Oregon law.

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[2] By "no evidence," Oregon courts mean "no substantial evidence." *See* Justice Lusk, *Forty-Five Years of Article VII, Section 3, Constitution of Oregon*, 35 Ore. L. Rev. 1, 22 & n.111 (1955) (collecting cases).

What is relevant here is the court of appeals' recognition of the limited scope of Art. VII, § 3 — a recognition that of course echoes the approach of the decision below. *See* Pet. App. 27a (appellate court can vacate punitive damage award if there is "no evidence that the statutory prerequisites for the award of punitive damages were met"). Besides the passages already quoted, the court of appeals in *Tenold* cited with approval several cases — including *Sigel v. Portland Ry. Light & Power Co.*, 135 P. 866 (Or. 1913) (*see* SA 13),[3] *Malpica v. Cannery Supply Co.*, 187 P.2d 596 (Or. 1920) (*see* SA 13),[4] and *Buchanan v. Lewis A.*

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[3] In *Sigel*, the Oregon Supreme Court rejected the defendant's argument that damages were excessive with the following explanation:

> The jury were permitted by the instructions of the court to take into consideration the plaintiff's bodily pain and suffering, the extent of her injury, loss of time, and her impaired capacity to earn her living in the future, and awarded her as compensation therefor the sum of $1,500. The condition of plaintiff caused by the negligence complained of was explained in detail by the physicians who were witnesses, and by plaintiff, and it was shown what amount she had been able to earn prior to the accident. It therefore became the duty of the jury to determine the amount of her damages. Various men might, under the evidence, reach different conclusions in regard thereto. The damages assessed by the verdict do not indicate that the same were fixed in excess of an amount fairly within the range of the evidence, so that a court can say there is no evidence to support the verdict. The trial court did not so find.

135 P. at 867.

[4] In *Malpica*, the court entertained on the merits the defendant's challenge to the sufficiency of the evidence to support the size of the $12,000 verdict returned by the jury: "The circuit court was of the opinion that the plaintiff should not recover more than $2,000, and it is probable that other juries might return a verdict for less than $12,000; but the fact remains that the plaintiff was injured, that his disability is permanent, and that in addition to his pain and suffering the use of his arm is gravely impaired. . . . Although in the opinion of this court the amount of damages awarded might be deemed excessive, we cannot affirmatively say that there is no evidence to support it." 187 P. at 598.

Hicks Co., 134 P. 1191 (Or. 1913) (*see* SA 12),[5] — indicating that "Article VII, § 3 is a *limitation* on the court's power to set aside or modify a jury's factual determination of damages . . . following a fair trial," SA 13 (emphasis added), but cannot possibly be described as a complete extinguishment of that authority, even on post-verdict review, as Honda claims.

Moreover, even apart from *post*-verdict judicial review, Oregon provides the *pre*-verdict review of the size of the damages that *Lyons v. Browning*, 133 P.2d 599, 600 (Or. 1943), and *Van Lom v. Schneiderman*, 210 P.2d 461, 467 (Or. 1949), indicate has long been available. *See* Resp. Br. 37. *Van Lom* makes clear that it is reversible legal error to "instruct[] the jury in effect that they were authorized to find a verdict for the plaintiff in ... the full amount prayed for ... when the evidence would not support such a verdict." 210 P.2d at 467. In *Tenold*, the court of appeals reaffirmed that Article VII, § 3 limits post-verdict judicial review only where there is "'evidence to support a verdict'" and where "'the facts have been submitted to a jury *under proper instructions*.'" SA 15 (quoting *Love v. Chambers Lumber Co.*, 64 Or. 129, 133 (1913)) (emphasis added); *see also* SA 13 (Art. VII, § 3 applies only where jury has received "'proper instructions'") (quoting *Sigel*, 67 Or. at 291).

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[5] In *Buchanan*, the supreme court denied a petition for rehearing which "contended . . . that the verdict, awarding the plaintiff $1,500 for the slight injury which he suffered, is so excessive that an error was committed in refusing to set aside the judgment and grant a new trial." 134 P. at 1191. Applying Art. VII, § 3, the court concluded that "the Supreme Court, on appeal, is powerless to re-examine any fact tried by a jury *unless it*, like the lower court, in passing upon a motion for new trial, *can affirmatively say there is no evidence to support the verdict.*" *Id.* at 1192 (emphasis added). By "the verdict," the court clearly meant the *amount* of the award, since that was the only element of the judgment subject to rehearing. Indeed, if the court had been referring simply to liability issues, it would not have needed to discuss Art. VII, § 3 at all, since the court had previously settled the liability question. *See Buchanan v. Lewis A. Hicks Co.*, 133 P. 780 (Ore. 1913).

Of course, if for any reason a verdict in a given amount were deemed *not* to be subject to review and reversal under applicable Oregon law (here ORS 30.925, coupled with Art. VII, § 3), then — *as a matter of Oregon law* (and apart from any claim of gross excessiveness under federal law, *see TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993)) — that award would *by definition* not be "excessive" for state-law purposes. It is, after all, the entire corpus of applicable state law — including the State's institutional and procedural scheme for constraining discretion or leaving its exercise unreviewed — that determines whether or not a defendant in Honda's position has, as it claims (*see* Reply Br. in Support of *Cert.* at 3; Pet. Br. 27 & n.18; Reply Br. 18, 20), been deprived of a state-created entitlement that triggers any federal right to procedural due process. *See Olim v. Wakinekona*, 461 U.S. 238, 248-51 (1983); *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 463-65 (1981); *Bishop v. Wood*, 426 U.S. 341, 344-47 (1976). "Mere violation of a state statute does not infringe the federal Constitution," *Snowden v. Hughes*, 321 U.S. 1, 11 (1944), and "[o]utside of the capital context, [this Court has] never said that the possibility of a jury misapplying state law gives rise to a federal constitutional error." *Gilmore v. Taylor*, 113 S. Ct. 2112, 2117 (1993).

Respectfully submitted,

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April 21, 1994

APPENDIX

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

THOMAS TENOLD,

Respondent,

v.

WEYERHAEUSER COMPANY, a corporation, and LARRY HOFF,

Appellants.

(89-2198 CV; CA A72816)

In Banc*

Appeal from Circuit Court, Klamath County.

Rodger J. Isaacson, Judge.

Argued and submitted April 19, 1993; resubmitted in banc November 3, 1993.

Jeffrey M. Batchelor argued the cause for appellant Weyerhaeuser Company. Alan M. Scott argued the cause for appellant Larry Hoff. With them on the briefs were James H. Clarke and Lane, Powell, Spears, Lubersky, and Galton, Scott & Colett.

George W. Kelly argued the cause and filed the brief for respondent.

DURHAM, J., *pro tempore*.

Affirmed.

Edmonds, J., concurring in part and dissenting in part.
* Haselton, J., not participating.

DURHAM, J., *pro tempore*.

Defendants appeal a jury verdict entered against them for $2,552,566. They make multiple assignments of error. We affirm.

Plaintiff filed three claims against defendant Weyerhaeuser Company (Weyerhaeuser): malicious prosecution, intentional infliction of severe emotional distress and defamation. The jury found for plaintiff and awarded $900,000 noneconomic damages, $2,566 economic damages and $1,500,000 punitive damages against Weyerhaeuser on those claims. The jury found defendant Hoff liable on plaintiff's claims of intentional infliction of severe emotional distress and defamation and awarded $100,000 noneconomic damages and $50,000 punitive damages against Hoff.

In its first two assignments of error,[1] Weyerhaeuser argues that the trial court erred in denying its motions to withdraw from the jury the issue of its vicarious liability for Klamath County Sheriff Deputy Wilson's conduct. We review the evidence in the light most favorable to plaintiff to determine if there was sufficient evidence to submit the issue to the jury. *Turman v. Central Billing Bureau, Inc.*, 279 Or. 443, 445, 568 P.2d 1382 (1977).

Weyerhaeuser owns and operates a railroad as part of its business in Klamath County. Plaintiff worked for Weyerhaeuser for 12 years as a member of a section crew on the railroad. Defendant Hoff is a security supervisor, whose duties include investigating thefts of company property. Weyerhaeuser and the Klamath County sheriff's office entered into a contract under which Klamath County provided "Forestry Patrol and field investigation on Weyerhaeuser's property." Klamath County Sheriff Deputy Wilson carried out the county's responsibilities under the contract. Weyerhaeuser also hired Green, a private security guard, to live on its property and to provide 24-hour security.

On July 6, 1988, plaintiff asked Hoff if he could "get some railroad ties." Hoff told him it was "no problem," and instructed

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[1] Some assignments are made by Weyerhaeuser alone; some are made by both defendants.

him to inquire of the company how much they would cost. The next day, plaintiff asked Hoff if he could use some company equipment to pick up the ties, and Hoff said "that would be fine." On July 15, 1988, Green informed Hoff that plaintiff had delivered railroad ties to a cattle ranch. Hoff reported to Walt Barnes, his immediate supervisor, and to Steve Kirk, a security supervisor, that he suspected that plaintiff had stolen the ties delivered to the ranch. Kirk then contacted Wilson and asked him to investigate. While Wilson was interviewing the owner of the ranch, he told the owner that plaintiff had stolen 600 ties and sold them to others "around the country." While being interviewed by Hoff, two of plaintiff's co-workers said that they had helped plaintiff load some ties, and that plaintiff had told them that he intended to pay for the ties. Hoff did not tell his supervisor or Wilson about the information.

Shortly after his investigation began, Wilson went to plaintiff's home and told him that "it didn't look good" and that if he would admit guilt, he would not be arrested in front of his family. Plaintiff claimed that he had permission to take the ties. On August 1, plaintiff, Hoff, Barnes and a union representative met. Plaintiff admitted taking some ties but repeatedly maintained that Hoff had given him permission. After the meeting, Barnes met with his supervisor, McClure, and told him that plaintiff "had taken ties, and that he really offered no excuses or reasons for taking the ties without paying for them." Based on that information, Weyerhaeuser terminated plaintiff's employment.

At about the same time, Wilson issued plaintiff a criminal citation for theft in the second degree, and Kirk asked the district attorney to prosecute plaintiff. Wilson's report to the district attorney did not disclose plaintiff's contention that Hoff had given him permission to take the ties with the understanding that he would pay for them at a later time. Plaintiff was indicted by the Klamath County grand jury. Subsequently, the district attorney moved to dismiss the indictment after learning that some of the ties that plaintiff had been accused of stealing did not belong to Weyerhaeuser, and that plaintiff had paid for them.

There was also evidence in the record that Hoff and other employees at Weyerhaeuser had ill will toward plaintiff. An employee testified that Hoff told him, sometime in 1986, that "there's more than one way to get rid of [plaintiff]." Kirk testified that a Weyerhaeuser manager who was involved in the investigation said, "I don't care what the court system does or anything else, that I -- I will have the man's job." Kirk also recalled in his testimony that Hoff had come to him after the charges against plaintiff were dropped and said that he had caught plaintiff in possession of marijuana a couple of years ago, that plaintiff was a drug addict, and that he wanted plaintiff "gone." Hoff's foster son testified that he overheard Hoff tell his wife that plaintiff was a drug user who had a methamphetamine lab in his house, and that he was always drunk at work. Plaintiff denied those allegations at trial.

Weyerhaeuser asserts that the trial court erred when it submitted the issue to the jury of whether Wilson was "its agent when he engaged in the conduct the jury ultimately found to be tortious." Weyerhaeuser's vicarious liability for Wilson's conduct depends on whether Wilson was an "employee" of Weyerhaeuser and committed the alleged tortious acts within the scope of his employment.[2] *Stanfield v. Laccoarce*, 284 Or. 651, 654, 588 P.2d 1271 (1978). Although the parties agree that Wilson was an employee of the county, in addition, he could be a "loaned" employee of Weyerhaeuser, if Weyerhaeuser had the right to exercise control over the manner and means by which Wilson performed his duties. *See Penrose v. Mitchell Bros.*, 246 Or. 507, 512, 426 P.2d 861 (1967); *Nordling v. Johnston*, 205 Or. 315, 332, 283 P.2d 994, 287 P.2d 420 (1955); *Nichols v. Baggarley*, 79 Or. App. 505, 508, 719 P.2d 914 (1986).

The contract between Klamath County and Weyerhaeuser says:

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[2] Defendants do not argue that Wilson was not acting within the scope of his employment when the alleged tortious conduct occurred.

> "[Weyerhaeuser] may increase, decrease or alter work to be done and materials furnished hereunder, and any changes occasioned thereby in amounts to be paid hereunder shall be agreed to in writing prior to performance of such work or furnishing such materials. * * * All work or materials furnished hereunder shall at all times be subject to the inspection and approval of [Weyerhaeuser]."

That language could be construed to indicate that the parties intended that Wilson was the employee of Klamath County only and Weyerhaeuser is not liable vicariously for Wilson's conduct, as defendants argue. However, because the provision says that Weyerhaeuser has the right to "increase, decrease or alter the work to be done and the materials furnished" and the right to inspect and approve the work, it is also subject to the interpretation that Weyerhaeuser had the right to control the manner and means that Wilson used to accomplish the results sought by Weyerhaeuser. Those alternative interpretations demonstrate the ambiguity of the agreement, and the meaning of an ambiguous contract is an issue to be decided by the trier of fact. *David M. Scott Const. v. Roush*, 273 Or. 877, 880, 544 P.2d 162 (1975).

Also, what the parties intended under the contract often is discernable by their conduct in carrying out the terms of the contract. *See Tarlow v. Arntson*, 264 Or. 294, 300, 505 P.2d 338 (1973). Wilson testified that Kirk asked him to investigate and told him who to contact. Wilson also testified that he kept Kirk updated on the progress of his investigation and gave him a copy of his report. Kirk testified that Weyerhaeuser had "control" of the investigation and that, whenever it had a problem to investigate, the deputy was at his "disposal." There was also a handwritten statement by Wilson that said that the "reason [the criminal prosecution] was dropped was per Steve Kirk's decision." We conclude that from the entire evidentiary record, the jury could have found that Weyerhaeuser had the right of control over Wilson's conduct such as to constitute a master-servant relationship. *See Meskimen v. Larry Angell Salvage Company*, 286 Or. 87, 592 P.2d 1014 (1979).

In their third and fourth assignments of error, both defendants contend that the trial court erred in denying their motions for directed verdict on plaintiff's claims for intentional infliction of severe emotional distress. They argue that plaintiff did not present any evidence to prove that defendants' conduct was an extraordinary transgression of the bounds of socially tolerable conduct. To prove a claim for intentional infliction of severe emotional distress, plaintiff must prove that:

> "(1) the defendant intended to inflict severe emotional distress on the plaintiff, (2) the defendant's acts were the cause of the plaintiff's severe emotional distress, and (3) the defendant's acts constituted an extraordinary transgression of the bounds of socially tolerable conduct." *Sheets v. Knight*, 308 Or. 220, 236, 779 P.2d 1000 (1989).

It is a question of law whether, viewing the evidence in the light most favorable to plaintiff, defendants' conduct constitutes "extraordinary conduct which a reasonable jury could find beyond the farthest reaches of socially tolerable behavior." *Hall v. The May Dept. Stores*, 292 Or. 131, 137, 637 P.2d 126 (1981).

In *Hall v. The May Dept. Stores*, *supra*, the plaintiff was suspected of stealing money and was interrogated based on "scant" evidence. The court said that

> "the jury could find that [the security officer] knew that he did not have 'proof' of plaintiff's guilt, that he knew he did not have evidence sufficient to have her arrested, that he nevertheless told her that he had sufficient proof to have her arrested and charged with embezzlement, and that he shouted at plaintiff and pounded the desk, referring to sheets of paper which he did not explain to her." 292 Or. at 141.

From this evidence, the court held that the jury could infer that the security officer was engaging in a deliberate and systematic tactic to threaten and frighten the plaintiff into a confession and to make her an example to other employees. The court said that,

> "if a jury, drawing all possible inferences favorable to plaintiff, found an intentionally oppressive method of browbeating an employee into a confession, it could also decide that this method went beyond the outer bounds of socially tolerable employer practices." 292 Or. at 142.

Furthermore, in *Woods v. First American Title Ins. Co.*, 102 Or. App. 343, 348, 794 P.2d 454 (1990), *rev. den.* 311 Or. 151 (1991), we said that

> "[f]alsely accusing someone of being a liar, a thief and a fraud before a third person, knowing that the accusations are not true, and persuading a police officer to harass the accused person on the basis of those assertions, constitute more than every-day rude behavior."

We concluded that the plaintiff's complaint stated a claim for intentional infliction of severe emotional distress.

Here, the crux of plaintiff's claims for intentional infliction of severe emotional distress is that employees at Weyerhaeuser intentionally and in bad faith made accusations that plaintiff had stolen the ties, despite having knowledge that he was given permission to take them and that he intended to pay for them. The jury could infer that Hoff knew that plaintiff had permission to take the ties, but that he, along with other Weyerhaeuser employees, triggered an unfounded criminal investigation to get plaintiff fired, to defame him, and to cause him to be prosecuted by the district attorney. We hold that a jury reasonably could find that defendants' conduct exceeded the bounds of socially tolerable conduct under the circumstances. Therefore, the trial court did not err in denying defendants' motion for directed verdict on plaintiff's claims for intentional infliction of severe emotional distress.

Next, Weyerhaeuser assigns as error the trial court's denial of its motion to modify the judgment to reduce the amount awarded to plaintiff for noneconomic damages to $500,000 in accordance with ORS 18.560. The jury awarded plaintiff a total of $900,000 in noneconomic damages on his three claims against

Weyerhaeuser.[3] Plaintiff argues that, although ORS 18.560 limits his recovery for noneconomic damages to $500,000 per claim, he may recover more than $500,000 in noneconomic damages, because he prevailed on more than one claim. Weyerhaeuser argues that the limitation on damages in the statute means that the total award of noneconomic damages for all tort claims arising out of the same operative facts cannot be more than $500,000.

In construing statutes, our task is to discern the intent of the legislature. ORS 174.010; *Mattiza v. Foster*, 311 Or. 1, 4, 803 P.2d 723 (1990). We first look to the text of the statute to ascertain "what is * * * contained therein, not to insert what has been omitted, or to omit what has been inserted." ORS 174.010; *Sanders v. Oregon Pacific States Ins. Co.*, 314 Or. 521, 527, 840 P.2d 87 (1992). If the meaning of the statute is not apparent on its face, we look to the statute's context, and if that is not dispositive, then we examine its legislative history. *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 859 P.2d 1143 (1993).

ORS 18.560 provides, in part:

> "Except for claims subject to ORS 30.260 to 30.300 and ORS chapter 656, in any *civil action* seeking damages arising out of bodily injury, including emotional injury or distress, death or property damage of *any one person* * * * the amount awarded for noneconomic damages shall not exceed $500,000. (Emphasis supplied.)

The language of ORS 18.560 limits noneconomic damages to $500,000 in any "civil action." We cannot ascribe a plain meaning to the phrase "civil action," because "action" has been interpreted in a variety of ways. *See East Side Mill Co. v. SE Portland Co.*, 155 Or. 367, 372, 64 P.2d 625 (1937). Likewise, the statute's context is not dispositive and we find no express

[3] The jury awarded plaintiff $250,000 in noneconomic damages on his claim for malicious prosecution, $500,000 for his claim for intentional infliction of severe emotional distress, and $150,000 for his claim of defamation.

legislative history to indicate what the legislature meant by the phrase.[4] In the absence of such evidence, we will consider the objective of the statute to determine the legislative intent. *See State v. Parker*, 299 Or. 534, 540, 704 P.2d 1144 (1985).

ORS 18.560 was enacted as part of the 1987 "Tort Reform Act." Or Laws 1987, ch. 774, § 6. According to the legislative history, the purpose of imposing a cap on noneconomic damages was to stabilize insurance premiums and to decrease the costs associated with tort litigation. Minutes, House Judiciary Subcommittee, April 29, 1987, pp. 11, 15. In the light of that purpose, we are persuaded that the modern definition of an "action," adopted by the Supreme Court in *Dean v. Exotic Veneers, Inc.*, 271 Or. 188, 193, 531 P.2d 266 (1975), best fulfills the objective of the statute:

> "The most convenient [definition] is to consider a cause of action as an *aggregate of operative facts* giving rise to a right or rights termed 'right' or 'rights of action' which will be enforced by the courts. The number and extent of operative facts included within a single cause of action are to be determined pragmatically, mainly by considerations of practical trial convenience." (Emphasis supplied.)

The relevant factors for determining what connotes an "aggregate of operative facts" are "their relatedness in time, space, origin, or motivation, and whether, taken together they form a

[4] A preliminary version of ORS 18.560 said that "the amount awarded for noneconomic damages shall not exceed $500,000 per person in the aggregate." During its first work session, the legislature deleted the phrase "per person in the aggregate," because it found the language to be confusing. Chairman Frye said that the committee's intention was to limit damages to $500,000 per person and that the language that limits damages of any one person sufficiently reflected that intention. There was no discussion of multiple claims. Tape Recording, Senate Committee on Judiciary, March 23, 1987, Side A at 355-416.

convenient unit for trial purposes." *Troutman v. Erlandson*, 267 Or. 187, 206, 598 P.2d 1211 (1979). In this case, plaintiff's factual allegations about Weyerhaeuser's course of conduct are an aggregate of operative facts that give rise to several "rights of action." We conclude that the statute directs the trial court to reduce the noneconomic damage award to $500,000.

However, plaintiff contends that ORS 18.560 violates Article VII (amended), section 3, of the Oregon Constitution, which provides, in part:

> "In actions at law, where the value in controversy shall exceed $200, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict."

"Reexamine" means to subject to "a second or new examination." *Webster's Third New International Dictionary* 1907 (unabridged 1976). We cannot discern from the text and context of Article VII (amended), section 3, whether a court "re-examines" a "fact tried by a jury" when it reduces a damage award that exceeds the statutory limit. *See Company v. Water Wonderland Improvement Dist.*, 315 Or. 562, 570, 847 P.2d 841 (1993). To resolve that question, we look for guidance to the circumstances surrounding the adoption of Article VII (amended), section 3. *See PGE v. Bureau of Labor and Industries, supra*, 317 Or. at 611.

Van Lom v. Schneiderman, 187 Or. 89, 98, 210 P.2d 461 (1949), discusses the evolution of Article VII (amended), section 3. The framers of the United States Constitution preserved the right of trial by jury, as it was known at common law, in the Seventh Amendment, which provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

That amendment protected the jury trial right as it had developed in England. At the time of the adoption of the Seventh Amendment, English common law reserved to the jury the determination of the amount of damages. 3 W. Blackstone, Commentaries 396. However, the English system authorized the court, in a damage action, to grant a new trial if the judge believed that the verdict awarded excessive damages. *Van Lom* says that

> "the federal judges, like the English judges, have always exercised the prerogative of granting a new trial when the verdict was clearly against the weight of the evidence, whether it be because excessive damages were awarded or for any other reason." 187 Or. at 112.

Oregon preserved that federal jury trial right when it adopted Article I, section 17, as part of its Bill of Rights.[5] That section provides:

> "In all civil cases, the right of Trial by Jury shall remain inviolate."

Before 1910, Oregon also retained the tradition of allowing courts to set aside "excessive" verdicts. *Van Lom v. Schneiderman, supra*, 187 Or. at 105. For example, OCLA, § 5-802, authorized a new trial for:

> "(5) Excessive damages, appearing to have been given under the influence of passion or prejudice; (6) Insufficiency of the evidence to justify the verdict or other decision[.]"

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[5] *Deane v. Willamette Bridge Co.*, 22 Or. 167, 29 P. 440 (1892), on which the dissent relies, ___ Or. App. at ___ (dissenting slip opinion at 7), held that the plaintiff had no constitutional right under Article I, section 17, of the Oregon Constitution, to a jury determination of damages in a default proceeding, because the English common law did not afford a jury trial right in a default proceeding. *Deane* is of limited utility here, because it was decided 18 years before the adoption of Article VII (amended), section 3, and this case does not concern rules applicable to default proceedings.

See 187 Or. at 105.

In 1910, the people of Oregon adopted Article VII (amended), section 3. The amendment repeats the substance of Article I, section 17, but also creates a limitation on the authority of an Oregon court to reexamine a jury's determination of any fact, through the proscription: "no fact tried by a jury shall be otherwise re-examined in any court of this State." *Buchanan v. Louis A. Hicks Co.*, 66 Or. 503, 510, 133 P. 780, 134 P. 1191 (1913), describes the problem that the amendment was intended to correct:

> "Pursuant to the provisions of that statute [Lord's Oregon Laws, § 174] it had been the practice of many trial courts in Oregon, prior to the amendment of the organic law * * * to set aside judgments and grant new trials, when, from a consideration of all the evidence given at the trial of an action, it was believed the verdict was excessive. In order to inhibit such practice and to uphold verdicts, the Constitution was amended so as to preclude a court from re-examining any fact that had been tried by a jury, when the verdict returned was based on any legal evidence * * *."

In *Van Lom v. Schneiderman, supra*, 187 Or. at 95, the court said:

> "This last clause forbids re-examination of a fact found by a jury otherwise than by another jury * * *, and is transgressed every time that a court undertakes to revise or correct a jury's finding of fact (unless this be done by the Supreme Court where there is error in the record * * *). All that the court may do, so far as the facts are concerned, is to examine the record to determine whether it 'can affirmatively say there is no evidence to support the verdict.'"

The Supreme Court has held that the amendment was intended to prohibit courts from deciding that a jury's factual determination of the amount of damages is improper when measured against a statutory standard, such as "excessive," and nullifying the verdict.

> "The purpose of this amendment [Article VII, section 3] was to prohibit courts from setting aside or modifying judgments founded upon verdicts of juries, where there is no prejudicial error in the record. In this case the jury was properly instructed, and there is no assignment of error except as to the amount of the verdict. Under such circumstances, it was for the jury only to fix the amount of plaintiff's damages, which it did by a unanimous verdict.
>
> "* * * * *
>
> "Although in the opinion of this court the amount of damages awarded might be deemed excessive, we cannot affirmatively say that there is no evidence to support it. Under the record in the case, this court is powerless to grant relief." *Malpica v. Cannery Supply Co.*, 95 Or. 242, 247, 187 P. 596 (1920).

Malpica v. Cannery Supply Co., supra, is but one of many cases that hold that Article VII (amended), section 3, is a limitation on the court's power to set aside or modify a jury's factual determination of damages, or a judgment that embodies that determination, following a fair trial. In *Sigel v. Portland Ry. L. & P. Co.*, 67 Or. 285, 291, 135 P. 866 (1913), the court held that, after the plaintiff presented the evidence of her injury,

> "[i]t therefore became the duty of the jury to determine the amount of her damages. * * * The judgment on the verdict could not be set aside without the re-examination of a question of fact which had been tried by a jury upon legal evidence and under proper instructions as to the law."[6]

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[6] The determination of the amount of punitive damages is likewise a question of fact. *Van Lom v. Schneiderman, supra*, 187 Or. at 111, discussing punitive damages, says:

> "Under a system such as ours, where the court responds to the law and the jury to the facts, it would be difficult indeed to say that a question which for centuries has been submitted to the decision of a jury is other than a question of fact. And the reluctance of the courts, having power to do so, to

Roach v. Mead, 301 Or. 383, 385, 722 P.2d 1229 (1986), states:

> "In *Shepler v. Weyerhauser Company*, 279 Or. 477, 484, 569 P.2d 1040 (1977), which concerned a jury verdict for plaintiff in a negligence action, we defined our scope of review in civil actions at law:
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> "'* * * Since the verdict was for plaintiff, we could not find error * * * unless we could affirmatively say there is no evidence to support the verdict. (Oregon Constitution, Amended Art. VII, § 3.)'"

The Supreme Court has applied that limitation on appellate review authority since the earliest cases construing Article VII (amended), section 3.

> "[T]he Supreme Court, on appeal, is powerless to re-examine any fact tried by a jury, unless it, like the lower court, in passing upon a motion for a new trial, can affirmatively say there is no evidence to support the verdict. * * *
>
> "[T]he right, upon appeal, to correct a judgment rests upon an error of law committed by the trial court and not upon the re-examination of any fact tried by a jury, except in cases where the Supreme Court can affirmatively say there is no evidence to support the verdict." *Buchanan v. Lewis A. Hicks Co., supra*, 66 Or. at 511.

Sullivan v. Wakefield, 65 Or. 528, 535, 133 P. 641 (1913) says:

> "Under this section of the Constitution, a court cannot legally set aside the findings of the jury, where there has been no error of law, without affirmatively finding that there was *no* evidence to support the verdict." (Emphasis in original.)

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interfere with the jury's decision, gives added weight to this conclusion.

See also Hahn v. Mackey, 63 Or. 100, 111, 126 P. 12, 126 P. 991 (1912).

In *Love v. Chambers Lumber Co.*, 64 Or. 129, 133, 129 P. 492 (1913), the court said:

> "Where there is evidence to support a verdict, and the facts have been submitted to a jury under proper instructions, we are precluded from disturbing such verdict. Article VII, Section 3, of the constitution as amended November 8, 1910 * * *."

Similarly, the court said in *State v. Hill*, 63 Or. 451, 459, 128 P. 444 (1912):

> "Under the recent amendment to our constitution (Article VII, section 3), if there is any evidence to support the verdict, this court cannot disturb it. The jury are the exclusive judges of all questions of fact."

ORS 18.560 reinstitutes the practice of courts reducing excessive jury awards, except that it substitutes a statutory monetary standard, $500,000, for statutory criteria controlling judicial discretion (e.g., "excessive damages," "passion or prejudice," and "insufficiency of the evidence"). It requires the court to apply the monetary standard in every case, whether or not the evidence supports the jury's higher damage award. Article VII (amended), section 3, was designed to prevent that practice, because the people chose to make jurors the exclusive judges of the facts regarding the extent of a plaintiff's damages. We have examined the context of the adoption of Article VII (amended), section 3, and the problem that it sought to remedy. From our examination, we conclude that a jury's verdict on damages, which is supported by the evidence, is a "fact tried by a jury" under that amendment, and that ORS 18.560 violates that amendment, because it compels the court to reexamine the verdict by requiring the court to nullify the jury's factual determination to the extent that it exceeds the legislature's damage cap.

Weyerhaeuser argues that its motion did not threaten any interference with the jury's factual determination on damages because ORS 19.560 operates as a limitation after the jury makes

its award.[7] We give the same response to that argument as the Washington Supreme Court gave to it in *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 655, 771 P.2d 711, 780 P.2d 260 (1989): [8]

> "Respondents also contend that the damages limit affects only the judgment as entered by the court, not the jury's finding of fact. This argument ignores the constitutional magnitude of the jury's fact-finding province, including its role to determine damages. Respondents essentially are saying that the right to trial by jury is not invaded if the jury is allowed to determine facts which go unheeded when the court issues its judgment. Such an argument pays lip service to the form of the jury but robs the institution of its function. This court will not construe

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[7] The dissent relies on *Wiebe v. Seeley, Administrator*, 215 Or. 331, 335 P.2d 379 (1959), which interpreted a statutory limitation on wrongful death damages, for the proposition that, after the adoption of Article VII (amended), section 3, in 1910, "the legislature's authority to limit the amount of reasonable damages remained unfettered." ___ Or. App. at ___ (dissenting slip opinion at 8). *Wiebe* does not support that argument, because no party in *Wiebe* challenged the wrongful death statute under Article VII (amended), section 3. The court noted, "It is not suggested that such a statute is beyond the powers of the legislature." 215 Or. at 353. *Wiebe* construes a statute, not a constitutional provision.

[8] *Sofie* held that a statutory limit on the noneconomic damages recoverable by a personal injury or wrongful death plaintiff infringed on the Washington state constitutional guarantee of the right to trial by jury. The court's opinion reports that that view reflects the weight of authority from other jurisdictions, particularly those states that have analyzed the history of the jury trial right. 312 Wash.2d at 659. On that point, Oregon's constitutional history is similar to that of Washington, except that Oregon, by enacting Article VII (amended), section 3, has expressed its constitutional policy on protecting jury verdicts from judicial reexamination more clearly than any other state.

> constitutional rights in such a manner. As we once stated:
>
> "'The constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name * * *. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding. *State v. Strasburg*, 60 Wash. 106, 116, 110 P. 1020 (1910), quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325, 18 L.Ed. 356 (1866).'"

Weyerhaeuser also contends that, if the statute compels a reexamination of a fact found by the jury, courts are similarly barred from applying the statutes that govern contributory negligence, ORS 18.470,[9] and contribution, ORS 18.455.[10]

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[9] ORS 18.470 provides:

> "Contributory negligence shall not bar recovery in an action by any person or the legal representative of the person to recover damages for death or injury to person or property if the fault attributable to the person seeking recovery was not greater than the combined fault of the person or persons against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the percentage of fault attributable to the person recovering. This section is not intended to create or abolish any defense."

[10] ORS 18.455 provides:

> "(1) When a covenant not to sue or not to enforce judgment is given in good faith to one or two or more persons liable in tort for the same injury or the same wrongful death or claimed to be liable in tort for the same injury or the same wrongful death:
>
> "(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the covenant, or in the amount of the consideration paid for it, whichever is the

Those statutes are not analogous because, under them, the court gives effect to the jury's findings on damages. Under ORS 18.470, the court carries out the jury's findings on the amount of the plaintiff's damages and the plaintiff's proportionate fault. Under ORS 18.455, the court reduces the damage award by the amount that the plaintiff has already recovered from a co-defendant to ensure that the plaintiff receives only the amount of damages found by the jury. In contrast, ORS 18.560 directs the court to nullify the jury's verdict on damages to the extent that the verdict exceeds the amount that the legislature has determined is a fair award in all cases, regardless of the jury's contrary determination from the evidence in a particular case.

Weyerhaeuser's motion invited the trial court to set aside the jury's verdict, because it was too large when measured by the damage cap in ORS 18.560. Article VII (amended), section 3, forbids the court to reexamine the verdict unless no evidence supports it. Because evidence in the record supported the verdict, the court correctly refused to set it aside.[11]

Defendant's remaining assignments of error challenge the jury's punitive damages award. They assert that the award was excessive and, therefore, violated their rights under Article I, section 16, of the Oregon Constitution, the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[12] They assign as error the denial of their motion for a new trail on that basis. ORCP 64B. In *Oberg v. Honda Motor Co.*, 316 Or. 263, 275, 851 P.2d 1084 (1993), *cert. granted*, ___U.S. ___ 114 S. Ct. 751, 127 L.Ed.2d 69 (1994), the Supreme Court held that Article I, section 16, applies only to criminal cases, and that the award in that case did not violate the Due Process Clause under the holding in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991).[13] Similarly, Article 1, section 16, does not apply in this case and the punitive damages award does not violate defendants' due process rights in the light of the court's instruction that outlined objective criteria on which the jury was required to base its decision.[14] and because of the availability of

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greater; and

"(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

"(2) When a covenant described in subsection (1) of this section is given, the claimant shall give notice of all of the terms of the covenant to all persons against whom the claimant makes claims."

[11] In *Rogers v. Hill*, 281 Or. 491, 506, 576 P.2d 328 (1978), Justice Tongue, joined by Justice Lusk, in a special concurring opinion, said:

"[A]lthough juries may sometimes make mistakes, so do judges, and the voters and legislature of Oregon, by the constitutional and statutory provisions adopted by them, made a deliberate choice to confer upon juries the exclusive and final authority to resolve such questions and to remove from the courts the power to either set aside such determinations by juries *or to withhold such questions from juries for determination*." (Emphasis supplied.)

We do not address whether Article VII (amended), section 3, forbids courts from withholding traditional factual issues, such as the amount of a plaintiff's damages in a tort action, from a jury and, if so, whether ORS 18.560 violates that obligation.

We also do not address other arguments concerning the constitutionality of ORS 18.560. For example, we do not address whether ORS 18.560 violates the duty of courts to administer justice "completely," within the meaning of Article I, section 10, because it compels the court to reduce a jury's damage award that the evidence supports.

[12] Plaintiff argues that defendants did not preserve their argument that the punitive damages award violated the prohibition against excessive fines under both the federal and the state constitutions. We disagree.

[13] *See also TXO Production Corp. v. Alliance Resources Corp.*, ___ U.S. ___, 113 S. Ct. 2711, 125 L. Ed.2d 366 (1993).

[14] The jury was instructed:

"If you have found that Plaintiff is entitled to general

post-verdict review.

Regarding the Eighth Amendment, the United States Supreme Court held in *Browning-Ferris v. Kelco Disposal*, 492 U.S. 257, 264, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989), that the clause does not apply to awards of punitive damages in cases between private parties "when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded." The Court left open the question we must answer in this case: whether the amendment applies to a civil action when the government has a right to share in the award. In reviewing the purpose and the history of the Eighth Amendment, it said that the framers were concerned with "the potential for governmental abuse of its 'prosecutorial' power" and that the Excessive Fines Clause was "intended to limit only those fines *directly imposed by*, and payable to, the government."

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damages, you must then consider whether to award punitive damages. Punitive damages may be awarded to the Plaintiff, in addition to general damages, to punish the wrongdoer and to discourage the Defendant and others from engaging in wanton misconduct. In considering punitive damages, you must first determine whether the Defendant was guilty of wanton misconduct that caused damage to Plaintiff. Wanton misconduct is conduct amounting to a particularly aggravated deliberate disregard of the rights of others. If you decide this issue against the Defendant, you may award punitive damages, although you are not required to do so, because punitive damages are discretionary. In the exercise of the discretion[,] you may consider the *importance to society of deterring similar misconduct* in the future. If you decide to award punitive damages, you may properly consider the following items in fixing the amount. First, the *character of the Defendant's conduct*. Second, the Defendant's *motive*. Third, the *sum of the money that would be required to discourage* the Defendant and others from engaging in such conduct in the future. And fourth, the *income and assets* of the Defendant. The amount of punitive damages may not exceed the sum of $2,000,000 -- $1,000,000 on the malicious prosecution, and $1,000,000 on the intentional infliction of emotional distress." (Emphasis supplied.)

492 US at 266, 268. (Emphasis supplied.) Furthermore, it said that it

> "has never held, or even intimated, that the Eighth Amendment serves as a check on the power of a jury to award damages in a civil case. Rather, our concerns in applying the Eighth Amendment have been with the criminal process and with *direct actions initiated by government* to inflict punishment. Awards of punitive damages do not implicate these concerns." 492 U.S. at 259 (Emphasis supplied).

Under ORS 18.540[15] the government becomes a beneficiary of a portion of a punitive damages award after a verdict has been entered. In this case, a private party brought an action against defendants, and the jury directly imposed the judgment against defendants to punish and to deter future misconduct. The government of Oregon did not initiate this action. Because the purpose of the Eighth Amendment would not be furthered if applied under the circumstances, we reject defendants' arguments. The trial court did not err in denying their motion for a new trial.

AFFIRMED.

EDMONDS, J., concurring in part; dissenting in part.

I concur in the majority's opinion, except for the portion that holds that the limitation on noneconomic damages in ORS 18.560 is unconstitutional. The majority says that ORS 18.560 violates the prohibition in Article VII (amended), section 3, against the reexamination of a fact "tried by a jury," and thus, it invalidates

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[15] ORS 18.540 provides, in part:

> "Upon the entry of a judgment including an award of punitive damages, the Department of Justice shall become a judgment creditor as to the punitive damages portion of the award to which the Criminal Injuries Compensation Account is entitled pursuant to paragraph (c) of this subsection * * *."

the major component of the Oregon Tort Reform Law enacted in 1987. It rejects Weyerhaeuser's argument that the statute does not interfere with the jury's factual determination because the statute operates as a legal limitation after the jury makes its award on the basis of the reasoning of the court in *Sofie v. Fiberboard Corp.*, 112 Wash.2d 636, 771 P.2d 711), 780 P.2d 260 (1989). For the reasons that follow, the majority's reliance on that reasoning is ill-placed, and it errs when it declares the statute to be unconstitutional under section 3.

Sofie v. Fiberboard, supra, is about Article I, section 21, of the Washington Constitution, which provides that "the right of trial by jury shall remain inviolate."[1] Of course, Article VII

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[1] The language "the right to trial by jury shall remain inviolate," is found also in the Bill of Rights, Article I, section 17, as originally adopted in the Oregon Constitution. In Oregon, the provision has been interpreted to mean the "right [to have] a jury determine *all issues of fact*." *Molodyh v. Truck Insurance Exchange*, 304 Or. 290, 297, 744 P.2d 992 (1967) (emphasis supplied). There are differing interpretations of whether a statutory limitation of the amount [of] damages violates the "inviolate" right to trial by jury, depending on the jurisdiction. For instance, Article I, section 20 of the Indiana Constitution contains a provision identical to section 17 and Article I, section 23, of the Oregon Constitution. In *Johnson v. St. Vincent Hospital Inc.*, 404 N.E.2d 585 (Ind. 1980), the appellants argued that an Indiana statute which limited damages in medical malpractice cases violated section 20. The court disagreed.

> When a request is made to the trial court for an order to determine the amount due claimant from the patient's compensation fund after a trial by jury on the issue of damages has taken place and the trial court has rendered a judgment, no contest with regard to the total damages due claimant can or does exist. That issue has already been finally adjudicated by the trier of fact. * * * Furthermore, there is no indication in the cases relied upon by appellants that the right to have jury assess the damages in a case properly tried by jury constitutes a limitation upon the authority of the legislature to set limits upon damages. * * * It is the policy of this Act that recoveries be limited to $500,000, and to this extent the right to have the jury assess the damages is available. No more is required by Art. I, § 20 of the Indiana Constitution in this context." 404 N.E.2d at 602.

In my assessment, the Indiana Supreme Court's opinion has no more relevance to the Oregon Constitution than the Washington Supreme Court's opinion.

(amended), section 3, has entirely different language. The *Sofie* court examined the right to trial by jury as it existed in Washington at the time of section 21's adoption in 1889. The court was persuaded by the decision in *Baker v. Prewitt*, 3 Wash. Terr. 595, 19 P. 149 (1889):

> "*Baker*'s holding provides clear evidence that the jury's fact-finding function included the determination of damages. This evidence can only lead to the conclusion that our constitution, in article 1, section 21, protects the jury's role to determine damages." *Sofie v. Fiberboard Corp., supra*, 112 Wash.2d at 646.

This court's adoption of the *Sofie* court's reasoning without regard to the discrete language and history of section 2 constitutes a "nonanalysis" of the issue. Moreover, as will be demonstrated later, the Washington court's construction of section 21 is inconsistent with our Supreme Court's construction of Article 3, section 17, of the Oregon Constitution, although the language of the provisions is identical. Finally, the *Sofie* court's reasoning is flawed because it fails to recognize the difference between the jury's fact finding process and the imposition of a rule of law by a trial court subsequent to the jury's factual determination.

A proper analysis begins with the understanding that ORS 18.560 is presumptively constitutional, and that we cannot declare a law that the legislature has passed in the best interest of all of the citizens of Oregon unconstitutional except when the unconstitutionality is clearly shown. *See Boden v. Davis*, 205 Or. 421, 289 P.2d 1100 (1955). The first step of the analysis is to examine the language of section 3. It is presumed that the

language used in section 3 is sufficiently precise to convey the intent of its framers.

> "To find the thought a given [constitutional provision] expresses, the first resort in all cases is to the natural signification of the words used * * *. If thus regarded the words embody a definite meaning, * * * there is no room for construction." *Monaghan v. School District No. 1*, Clackamas County, 211 Or. 360, 367, 315 P.2d 797 (1957).

The majority says that "'reexamine' means to subject to a 'second or new examination,'" but that it cannot discern "whether a court 're-examines' a 'fact tried by a jury' when it reduces a damage award that exceeds the statutory limit." ___ Or. App. at ___. (Slip opinion at 11.) I disagree, because the meaning of section 3 is plain from the language of the provision. "Facts are actualities." *See Churchill v. Meade*, 92 Or. 626, 636, 182 P. 168 (1919). A determination of an ultimate fact is a determination of what took place based on the underlying evidentiary facts and the inferences drawn therefrom. *See Maeder Steel Products Co. v. Zanello*, 109 Or. 562, 570, 220 P. 155 (1924). In contrast, the imposition of a rule of law by a court arises from a different source; from the mandate of a constitutional provision, a statute or the case law. Although a ruling of law by the court often "flows from the ultimate facts" as found by the trier of fact, it is uniquely within the province of the court and it does not involve the fact finding process. *State v. Cummings*, 285 Or. 500, 532, 288 P.2d 1036 (1955); *see also Can-Key v. Industrial Leasing*, 186 Or. 173, 183, 593 P.2d 1125 (1979).

Section 3 recognizes that difference. It prohibits the "reexamination of facts" tried by a jury but at the same time preserves the power of the court to set aside a verdict if there is no evidence to support it. That language demonstrates that the framers were cognizant of the difference between the fact finding process and the imposition of a rule of law dictated by the facts of a case. Section 3 does not prohibit the imposition of a rule of law that supersedes a determination of fact by a jury.

The next step is to determine whether the application of ORS 18.560 to a jury verdict constitutes "a reexamination of fact" or the imposition of a "rule of law." It is clear that the determination by a jury about the amount of damages that plaintiff has incurred as a result of a defendant's conduct is a determination of ultimate fact and implicates section 3. *See Chance v. Alexander*, 255 Or. 136, 138, 465 P.2d 226 (1970). For instance, if a jury determines that the plaintiff has incurred $600,000 in noneconomic damages, no court in Oregon could lawfully reexamine the evidence and substitute its finding that the plaintiff had incurred only $450,000 in damages for the jury's determination.

However, ORS 18.560 does not require the trial court to make a reassessment of the amount of damages, but requires the court to perform a different function. It says, "the amount awarded for noneconomic damages shall not exceed $500,000," and requires the trial court to enter judgment for not more than that amount. No reevaluation of the amount of damages incurred by the plaintiff occurs. The statute establishes a fixed ceiling on the amount of damages for which a judgment could be entered. The effect of the statute is to impose a rule of law, a limit on "recoverable" damages on the jury's verdict. In that sense, the statue, in concept, is no different than other rules of law which require a trial court to enter a judgment that changes the decision of the jury, e.g., a directed verdict under ORCP 60, a judgment notwithstanding the verdict under ORCP 67, a reduction in an award of damages because of comparative negligence under ORS 18.470, or a judgment for treble damages for timber trespass under ORS 105.810. When the language of section 3 and ORS 18.560 are compared, logic tells us that the implementation of the statute does not involve the substitution of the court's determination of the amount of damages for that of the jury's.

Even if, because of an ambiguity in section 3, we are permitted to look further for the answer to the query, the majority's analysis is not helpful. None of the cases that it cites are about statutes that impose legal limitations on the amount of damages that are recoverable in a particular claim. All of them concern the setting aside of excessive verdicts on the basis that

the trial judge did not agree with the jury's determination of the facts. We must keep in mind that section 3 is to be interpreted to give effect to the intent of the people in adopting it in 1910. The majority is not permitted to rewrite the constitution to outlaw ORS 18.560 unless the statute conflicts with what the people had in mind at that time. *Jones v. Hoss*, 132 Or. 175, 178, 285 P. 205 (1930). With those principles in mind, I examine the background underlying the adoption of section 3 and its historical relationship to Article I, section 17.

Inherent in the majority's holding is the belief that plaintiffs had a historical right to unlimited damages for personal injury at common law and that the legislature cannot constitutionally limit the amount of damages that could be awarded in a personal injury action. That belief is mistaken. At common law, the courts could control excessive verdicts. They could order a new trial "when the verdict was clearly against the weight of the evidence, whether it be because excessive damages were awarded or for any other reason." *See Van Lom v. Schneiderman*, 187 Or. 89, 112, 210 P.2d 461 (1949). When the constitution was adopted, the founding fathers did not intend to create an enhanced right to trial by jury, but instead intended that the practice of the courts at the time continue. *See Tribou v. Strowbridge*, 7 Or. 156, 158 (1879).

If courts could control the award of damages under section 17, the legislature could also. For instance, in 1862, the legislature authorized courts to set aside verdicts and grant new trials because of "[e]xcessive damages * * * given under the influence of passion or prejudice." *See* General Laws of Oregon, ch. 2, § 232(5), p. 179 (Civ. Code) (Deady 1845-1864). More importantly, also in 1862, the legislature enacted a statute which limited the amount of recoverable damages in a wrongful death action:

> When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury caused by the same act or omission. Such action shall

> be commenced within two years after the death, and the damages therein shall not exceed five thousand dollars, and the amount recovered, if any, shall be administered as other personal property of the deceased person." General Laws of Oregon, ch. 4, § 367, p. 941 (Civ. Code) (Deady 1845-1864).

There is more evidence that bears on the state of the law before section 3 was adopted. In *Deane v. Willamette Bridge Co.*, 22 Or. 167, 29 P. 440 (1892), the Supreme Court recognized the constitutional authority of the legislature to govern the procedure of awarding damages when it upheld the constitutionality of a statute that required the court without the intervention of a jury to assess damages when the defendant was in default. The court noted the common law power of courts to decide questions of law and distinguished those matters from question of fact to be decided by a jury under section 17. 22 Or. at 173. It then held that the assessment of damages by a jury at common law when the defendant was in default was not a matter of right, but could be decided by the court alone. Thus, the statute was held constitutional in the face of a challenge under section 17.

Presumably, the drafters of section 3 were aware of existing statutes and precedents when section 3 was enacted in 1910. It is uncontroverted that the "mischief" at which the constitutional provision was aimed was the multiplicity of new trials that were being granted by trial courts on the basis of excessive damages. *Van Lom v. Schneiderman*, *supra*, 187 Or. at 100. To remedy that problem, section 3 provides that a new trial cannot be ordered unless it can be said affirmatively that there is no evidence to support the verdict or that there was legal error committed during the initial trial. However, the authority of a trial court to grant a nonsuit or directed verdict on point of law clearly remains uninspired by the amendment. Lusk, "Forty Five Years of Article VII, section 3, Constitution of Oregon," 35 Or. L. Rev. 1, 4, (1955).

In 1907, the legislature passed a law which amended the limitations on wrongful death damages and increased it to $7,500. *See* Lord's Oregon Laws § 380. There is no evidence

that I can find that suggests that the drafters of section 3 intended to nullify that law and it continued in various forms until 1967. Or. Laws 1967, ch. 544, § 2. *See also Weibe v. Sealy, Administrator*, 215 Or. 331, 351, 335 P.2d 379 (1959).[2] Consequently, the authority of trial courts to set aside verdicts after 1910 for excessive damages was limited, but the legislature's authority to limit the amount of reasonable damages remained unfettered. Under the circumstances, the majority cannot reasonably hold that the drafters intended by section 3 to abrogate the authority of the legislature to enact a statute like ORS 18.560.

In summary, the majority forgets about the import of the presumption that ORS 18.560 is constitutional, relies on a decision by the Washington Supreme Court about an unrelated provision of the Washington Constitution as the basis of its rationale, says that it cannot "discern" what "reexamination" of a fact means in the context of the plain language of section 3, and ignores the historical evidence about the objective of the framers of section 3. A philosophical difference with the legislature about the wisdom of the tort reform law is not a sufficient justification for declaring a statute unconstitutional. It is only when a statute violates the constitution expressly or implicitly that it is unconstitutional. ORS 18.560 does neither.

Because my analysis would result in holding that ORS 18.560 does not violate Article I, section 17, or Article VII (amended), section 3, I address plaintiff's alternative argument that the statute violates Article I, section 10, of the Oregon

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[2] In *Wiebe v. Sealy, Administrator, supra*, what the court said about the nature of a statutory limitation on damages is instructive:

> "*[T]he statue does not deal with the function of the jury at all, but with that of the court*. The legislature has said, in effect that regardless of the extent of the damages actually suffered by the plaintiff in an action against the estate of a deceased tort-feasor, *recoverable* damages may not exceed $15,000. * * * It is not suggested that such a statue is beyond the powers of the legislature." 215 Or. at 352. (Emphasis supplied).

Constitution. Section 10 provides:

> "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

Plaintiff argues that "the statute prevents a plaintiff with noneconomic damages in excess of $500,000 from receiving the 'remedy [* * *] for injury done him' which the constitution contemplates."

At common law, litigants had the right to recover damages for injury to their person or property and to have a jury assess those damages when the facts were in dispute. *Deane v. Willamette Bridge Co., supra*, 22 Or. at 173. However, the right did not prevent the legislature from changing common law remedies, or "attach[ing] conditions precedent to [their] exercise, and perhaps abolish[ing] old and substitut[ing] new remedies." *Mattson v. Astoria*, 39 Or. 577, 580, 65 P. 1066 (1901).[3] Article XVIII, section 7, provides:

> "All laws in force in the territory of Oregon when this constitution takes effect, and consistent therewith, shall continue in force *until altered or repealed*." (Emphasis supplied.)

Based on section 7, the Supreme Court in *Porozzi v. Ganioro*, 149 Or. 330, 40 P.2d 109 (1935), rejected the plaintiff's

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[3]The Supreme Court has acknowledged the authority of the legislature to limit remedies for common law causes of action on a number of occasions. For example, in *Holden v. Pioneer Broadcasting Co.*, 228 Or. 405, 365 P.2d 845 (1961), *cert. den.*, 370 U.S. 157 (1967), the court held that statutes eliminating the right of a defamed person to receive damages for an inadvertent libel when a retraction was made were constitutional under Article I, sections 8, 10 and 20, of the Oregon Constitution. See also *Noonan v. City of Portland*, 161 Or. 213, 240, 88 P.2d 808 (1939); *Evanhoff v. State Industrial Acc. Comm.*, 78 Or. 503, 154 P. 1061 (1915).

contention that the legislature could not abolish or limit an automobile guest's remedy for negligent injury in an action brought against his host. The court said:

> "The right to alter all laws in force in the territory of Oregon when the constitution was adopted, whether the same were of common-law or legislative origin, was reserved to the people of the state by article XVIII, § 7, supra. Indeed, that section of our organic act which adopted the common law of England clearly contemplated future changes in the common law, as evidenced in the condition expressed that the common law should continue in force 'until *altered or repealed*'. Moreover, had it been the intention of the framers of the constitution to adopt and preserve the remedy for all injuries to person or property which the common law afforded, they undoubtedly would have signified that intention by exact and specific wording, rather than the language used in Article I, § 10." 149 Or. at 346. (Emphasis in original.)

As the Supreme Court said in *Davidson v. Rogers*, 281 Or. 219, 222, 574 P.2d 624 (1978):

> "The language of the constitution does not specify that the remedy need be the same as was available at common law at the time of the adoption of the constitution; and the statute, *while restricting the remedy, does not abolish the cause of action*. Even though a retraction is not requested, the right of action still exists for an intentional defamation and, in any event, for recovery of specific demonstrable economic loss. Such limitation is not violative of Art. I, § 10, for the reason that *it does not wholly deny the injured party a remedy* for the wrong suffered." (Citations omitted; emphasis supplied.)

ORS 18.560 does not "wholly" deny plaintiff a remedy for his injury; it merely limits his recovery to all proven economic damages and up to $500,000 in noneconomic damages.

Therefore, I would hold that ORS 18.560 is constitutional under section 10.

The call for judicial restraint in these kinds of matters was best expressed in 1882: "When there is nothing in the section of the constitution referred to inhibiting, expressly or impliedly, the power of the legislature to enact the law in question, * * * it is not therefore repugnant to that section." *Crosap v. Gray*, 10 Or. 345, 349 (1882). Article VII (amended), section 3, Article I, section 17, and Article I, section 10, do not expressly or impliedly inhibit the legislature from setting statutory limitations on the amount of damages for which judgment can be lawfully entered. We should uphold the constitutionality of ORS 18.560 against the plaintiff's attacks.

Richardson, C.J. and Deits and Landau, JJ. join in this concurring in part and dissenting in part opinion.